BUSINESS AND PROGRESSIVISM

FROM

ROOSEVELT TO ROOSEVELT

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A senior thesis submitted to the History Department of Princeton University in partial fulfillment of the requirements for the degree of Bachelor of Arts.

Hamilton Osborne, Jr.
Princeton Class of 1965

SECOND REVISED EDITION
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To my mother, who typed it.

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PREFACE TO THE FIRST REVISED EDITION

Computerized optical character-reading equipment and word-processing systems have enabled me to revise and reprint my thesis, originally written 35 years ago while I was a senior at Princeton University, without the need for laboriously re-typing the entire document. Even so, the amount of time and effort necessary to accomplish the task proved to be more than I originally anticipated. I cannot complain, however, because this edition, unlike the original, is the product of choice rather than compulsion.

My reasons for preparing this revised edition were several. The principal motive was pure hubris. As I survey my original thesis, I am very proud of what I accomplished as a rather callow young man, especially since I received no significant assistance from anyone else in selecting the topic, researching the subject, or writing the paper. My thesis received the highest grade possible (1+ in the grading system then in use at Princeton), it and was a significant factor in my graduating *magna cum laude* and also being elected to membership in Phi Beta Kappa. Being proud of my work, I want to preserve and disseminate it. I particularly want my children to be able to read my paper when they are old enough to understand and appreciate it.

A second motive, closely related to the first, was a desire to perfect, as nearly as possible, the product of my earlier efforts. When I wrote the original, the technology of the period and the time constraints under which I labored did not permit me to perform the sort of editing and revision that I now consider routine when preparing briefs and memoranda in my law practice. It has long bothered me that my senior thesis, although a remarkable achievement for the circumstances under which it was created, contained some obvious, although relatively minor, mistakes and was several edits short of being a truly finished product. This edition, although not perfect, is much closer to meeting the standard of excellence to which all scholars should aspire.

A final motive for preparing this edition was the sheer pleasure of doing it. Expository writing is something I do frequently as a lawyer, and I enjoy it. Although I have never thought of writing as a hobby, I can understand why many people do.

This revised edition does not differ significantly in substance from the original, but I have made a number of editorial changes in the interest of clarity and readability. I have also revised the forms of the citations in the footnotes, and I have numbered the footnotes

consecutively throughout the entire paper rather than chapter-by-chapter. Unfortunately, I discarded many years ago my research notes from which the original thesis was written, so with limited exceptions, I have not been able to confirm the accuracy of the citations in the footnotes or the quotations in the text. The exceptions are the quotations from decisions of the United States Supreme Court, which are now available to me in the library of my law firm but were not available to me when I prepared the original paper.

I dedicated my thesis to my mother, who typed the original for me, and I wish to renew that dedication now. Her ability and willingness to type 165 nearly flawless pages of double-spaced text with an old manual typewriter in a very short period of time are perhaps no less remarkable than my ability to write them.

Hamilton Osborne, Jr.

Columbia, South Carolina
October, 2000

PREFACE TO THE SECOND REVISED EDITION

In September, 2016, fifty-one years after my graduation from Princeton and sixteen years after I completed the first revision of my senior thesis, I decided to read and review the first revision before providing copies to friends and family members. I quickly started finding mistakes and other things I wanted to change that I had somehow overlooked during the first revision. Consequently, I decided to prepare this second revised edition. I do not anticipate any further revisions.

Hamilton Osborne, Jr.

Columbia, South Carolina
September, 2016

INTRODUCTION

Perhaps the most perplexing problem that arises within a democracy or any other form of government that depends at least in part on popular support for its existence is how to resolve the conflict between the rights and privileges of the individual and the rights and privileges of the majority, usually referred to as the "public." The problem is especially perplexing in economic matters, for many practices that are deemed offenses to the public interest, such as combinations to raise prices, are merely logical extensions of the right to make contracts. Furthermore, it can be argued that no one can be forced—in a democracy, at least—to produce goods and services at all. Why, then, should the public have the power to dictate the conditions under which it will allow goods and services to be produced? It would seem that the public should be willing to accept goods and services on the terms of the producers or do without them.

There are other considerations, however. Those who contract in restraint of trade often restrict the rights of others to enter into contracts or to exercise other lawful rights and privileges. The great offense of the monopolists of the period around the beginning of the Twentieth Century was not the high prices they charged but the methods by which they maintained the markets for their highly priced goods. A monopoly, by definition, is created by excluding others from the market. Yet on the other hand, any assumption of business by one party necessarily excludes another from the opportunity to fill the same position, so it would be unfair to condemn monopolies simply on the grounds that they exclude others from the market. Someone must be excluded from every position that is filled, and positions must be filled if the needs of society are to be met.

The issue of the public interest versus the private interest in business thus resolves into the question of how those who will be allowed to occupy certain positions to the exclusion of others will be chosen. It is a matter of private interest versus private interest. In the United States it is generally believed that the person who can most effectively and efficiently perform the functions of a particular position has a right to occupy that position. Positions are therefore filled on a competitive basis, the position going to the one who performs most efficiently and effectively in competition.

In order that competition be a true and fair test of the abilities of all possible contestants, it is essential that freedom to compete and fair rules of competition be maintained. If an able

competitor is excluded from competition by a less able competitor, it is an abridgement of his rights.[1] The public interest is offended because it is in the public interest that the rights of individuals be protected. The public takes further offense at being excluded from the enjoyment of the produce of the most efficient producer.[2] The government is called upon to police the arena of competition to protect both the private and the public interests.

The problem is complicated by several factors. It is difficult to determine what is and what is not a fair method of competition. Some methods are fair in one context and not in another. For instance, price-cutting is a legitimate form of competition among established producers, but it might also be used to oppress struggling young firms for the purpose of driving them out of business and so to limit the number of competitors. Care must be taken to see that no single company can establish a monopolistic strangle-hold on an industry by virtue of being the only survivor of ruthless competition. On the other hand, some industries, because of the nature of their technologies, cannot support more than a few major competitors. These few competitors might enjoy virtual monopolies within their respective sales regions simply because it is not economically feasible for a competitor to exist. The problem in cases such as these is to judge the companies not on the basis of their monopolistic positions but on the basis of their economic behavior.[3]

The decisions that must be made in formulating rules for business competition are subjective at best and are certain to provoke argument whenever they are revised. During what is generally designated as the progressive era by historians, the period in American history from about 1900 to the entrance of the United States into the First World War, the American people were faced with the problem of examining and revising their rules of business. A great many people felt that the resources of the nation should be used more directly for the benefit of the

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[1]The right of the individual to compete is somewhat vague and ill-defined in American jurisprudence but is no less real and effective for being so. It is embodied in the concept of the right of the individual to the "pursuit of happiness" as found in the Declaration of Independence and in numerous civil laws that protect the right of the individual to pursue any activity that is not offensive, as judged by the majority, to the liberties of other individuals.

[2]This right of the public to the enjoyment of the fruits of the most efficient producer is somewhat more tenuous than the individual right to compete. It seems to be a commonly accepted notion, both now and in the past, but it is difficult to define or defend legally. It seems to have been an implicit motivation behind the passage of antitrust laws while the protection of individual rights was the explicit justification.

[3]When oligopolies and monopolies that are the result of economics rather than deliberate design are expected to behave as if they had competitors, it is clearly a case of asserting the right of the public to enjoy the most efficient possible production.

average citizen, and they were consequently desirous of freeing those resources from the control of various vested-interest groups. People of these convictions combined with others who were seeking other forms of social reform to constitute a movement that is generally known as progressivism. Or, as Arthur Link has put it,

> Progressivism might be defined as the popular effort, which began convulsively in the 1890's and waxed and waned afterwards to our own time, to insure the survival of democracy in the United States by the enlargement of governmental power to control and offset the power of private economic groups over the Nation's institutions and life.[4]

Actually, no single definition of progressivism will suffice, for progressivism was a very diverse philosophy—or, more properly, group of philosophies—with elements that were often conflicting and contradictory. The main thrust of progressivism was directed at trusts, monopolies, and large combinations, and yet Theodore Roosevelt, who became the presidential candidate of the Progressive Party in 1912, was avowedly sympathetic to big business.[5] This apparent paradox was not so strange as it might at first appear, for Roosevelt also believed in extending government authority to regulate big business closely to assure that its operations were consistent with the public interest.

More surprising was the influence that big business exerted on the Progressive Party platform of 1912. Big business responded to the pressures for reform by taking the lead in developing philosophies that would satisfy the popular demand for better regulation of business but that would also protect the interests of big business. The program advanced by big business was even more progressive than the progressives—*plus royaliste que le roi*, as it were—in that it advocated a much greater extension of government authority over business than the mere establishment of antitrust laws within the scope of which business could operate unhindered. Big business interests foresaw a relationship in which all business of consequence would be closely regulated by the government much as the railroads were regulated by the Interstate Commerce Commission.

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[4]Arthur S. Link, "What Happened to the Progressive Movement in the 1920's?," LXIV *American Historical Review* 836 (July, 1959).

[5]Unlike the amorphous progressive movement in general, the Progressive Party of 1912 had an explicit, written program that can be referred to and described specifically. The term "Progressive" (capitalized) or variations thereof will be used in this paper to refer only to the program of the Progressive Party of 1912, while "progressive" (uncapitalized) will be used to refer to the general movement.

In a book published in 1963, Gabriel Kolko examined the philosophies of big business during the progressive era at length and came to the conclusion that the progressive era should more properly be thought of not as a period of reform but as an age of triumph for conservative and vested interests.[6] Robert Wiebe also gave the problem extensive study in two articles published in the late 1950's and in a book published in 1962. Wiebe was somewhat more reserved in his conclusions than Kolko.[7] Wiebe pointed out that there were other business interests besides big business that must be taken into account in analyzing the politics of progressivism, and he refrained from making sweeping generalizations about the progressive era.

The element that is most seriously lacking in the work of both Kolko and Wiebe is readily apparent from a comparison of their work with the work of Arthur Link.[8] Link concerned himself with the effects that progressivism had on the ideas and events of succeeding periods. He did not isolate progressivism from its historical context as if it were no more than an interesting but ephemeral episode in American politics. Instead, Link viewed progressivism as an integral part of the continuum of American politics since the beginning of the Twentieth Century. Link's treatment, although sometimes cursory because so much is considered, is superior to those studies that remove progressivism from its total historical context, for it is only by studying progressivism as it evolved and persisted over the years that its full impact on American politics and history can be appreciated. Indeed, there are many events in decades following the progressive era that can hardly be explained without reference to progressivism.

The importance of progressivism goes beyond the field of American historiography. Like most questions of importance to historians, progressivism has implications of importance to the conditions of today. In the case of progressivism, it is the problem of public regulation of private business interests that is still so important and still not completely resolved. The

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[6]Gabriel Kolko, *The Triumph of Conservatism* (1963).

[7]Robert H. Wiebe, *Businessmen and Reform: A Study of the Progressive Movement* (1962); "Business Disunity and the Progressive Movement," XLIV *Mississippi Valley Historical Review* 664-85 (March, 1958); "The House of Morgan and the Executive, 1905-1913," LXV *American Historical Review* 49-60 (October, 1959).

[8]Arthur S. Link, *American Epoch: A History of the United States Since the 1890's*, *passim* (1963); "What Happened to the Progressive Movement in the 1920's?," *supra* note 4, at 833-51; *Wilson: The New Freedom* (1956).

problem has facets today that were never contemplated during the progressive era but that still bear remarkable resemblance to those of the early Twentieth Century.

For instance, during the progressive era a major public issue was what the relationship between business and government should be. Many felt that government should merely police business, prosecuting it when it transgressed a pre-defined set of rules but otherwise leaving it to pursue its endeavors alone. Others, generally businessmen, declared that government should not just police business with a set of penalties but should become its friend, advising it, assisting it, and helping it to correct its mistakes. In more recent times, the same question has been raised with respect to the regulation of commercial airlines by the Federal Aviation Administration, an agency similar to the Interstate Commerce Commission but that was, of course, not even foreseen during the progressive era.[9] Other similar agencies of the government such as the Federal Communications Commission and the Federal Trade Commission, the agency about which the controversy began, have to contend with the same problem.

It would be naive to suppose that the answers to the problems of today can be discovered from a careful reading of history, but a full appreciation of the problems that preceded them will lend invaluable insight into conditions of today and of the future. This dissertation will seek an understanding of the issues and problems of the progressive era that applied to antitrust legislation in an attempt to illuminate the events of decades following and of today. The study will span thirty years and of necessity will omit consideration of many important points in order to concentrate upon those that seem most important. A less ambitious span of time might have been more advisable for a paper of this length, but as demonstrated by Arthur Link, the full story of progressivism could not be told within a lesser span.

[9]"U.S. Inspectors Check Operations of a Busy Airline," IV *The National Observer* 1, 14 (Mar. 1, 1965).

THE BEGINNING: THEODORE ROOSEVELT

At the beginning of the Twentieth Century, the issue of the proper relation of business to government was far from being resolved. The Sherman Act had failed to provide a clear standard for business behavior or for government policy toward business. Consequently, the great antitrust law tended to be ignored by business and government alike. The American economy continued to grow, basically unaltered in form. To be sure, the trust movement, during which stock pools or trusts were formed to control groups of independent companies within an industry, had been checked by the Sherman Act, but only to be replaced by the merger movement, during which many corporations were amalgamated into much larger corporations.

Increasing prosperity since 1897 had created a demand for securities, and the promoters of Wall Street willingly obliged by generating vast amounts of new stock. By arranging consolidations among many small, independent companies in the same field of business, a promoter, usually a Wall Street banking firm such as the famed concern of John Pierpont Morgan, was able to reap enormous profits from the sale of the stock of the new combination. The trick was fairly simple. In forming the combination, the promoter exchanged the stock of the new corporation for the stock of the smaller constituent companies. The stock of the new company was usually given a total face value far in excess of the aggregate worth of the constituent companies. The new stock could be exchanged for the old on a one-for-one basis and still leave a good deal over. The excess was distributed to the principals involved in arranging the transaction, the promoter always getting a generous portion. The over-valued stock could easily be sold for a quick and handsome profit on a market hungry for securities.

Mergers thus provided an easy way for the financial community to revive the easy profits that had died with the trusts as a result of the passage of the Sherman Act, but mergers also created problems of their own. Only so many mergers could be performed before there would be no more companies left to merge. Indeed, by the turn of the century the merger movement had just about run its course. The formation of the United States Steel Company in 1901 was the last great merger. Thereafter, the antitrust sentiment that was part of the growing progressive movement, saturation of the securities market with over-valued stock, and growing suspicion of the government toward the manipulations of Wall Street combined to slow the merger movement.

The rise of progressivism brought a revival of the trust issue, which had lain almost dormant in the 1890's. Businessmen had seemingly laid it to rest in spite of the Sherman Act by asserting that mergers, combinations, and other forms of cooperation among businesses were not only economically desirable but also necessary and inevitable. There was growing interest in modern techniques of industrial management that were aimed at greater efficiency, lower waste, etc. The advantages claimed for large-scale production were employed as excuses for the stock manipulations of the Wall Street financiers.

Unquestionably, the collecting of American business into larger units of production did lead to real improvements in the nation's machinery of production, but the merger movement had been carried too far. Kolko argued effectively that the very largest companies of the period, the products of ambitious mergers, generally did rather poorly.[10] Other accounts seem to bear him out. The largest business combinations were almost always heavily burdened by over-capitalization on which they had to pay interest and dividends. Their great size often made them unwieldy to manage because they had been formed overnight, as it were, without the benefit of systematic integration of their constituent parts. Furthermore, the practice of deliberate and flagrant over-capitalization was little more than outright fraud, and investors often found themselvles bilked for the benefit of the financial magnates. Consequently, popular feeling began to turn against the large combinations.

In Theodore Roosevelt the business community found that it had a skeptic, if not a non-believer, on its hands. In 1901 a short but severe panic had been created by the efforts of two rival factions, Morgan and the Standard Oil millionaires versus Edward Henry Harriman and his allies, to buy up control of the Northern Pacific railway system. The financial duel was eventually settled by a compromise in which the two factions agreed to take part ownership of the Northern Securities Company, which was created to hold the stock in question. Before the fight was over, many investors and dealers suffered great losses when they were caught short in a cornered market. Theodore Roosevelt reacted by ordering an investigation of the Northern Securities Company, which was eventually dissolved as a result of Roosevelt's action.

The Morgan forces were caught completely off guard. J.P. Morgan reacted, as one account has it, by saying, "If we have done anything wrong, send your man to my man and they

[10]Kolko, *Triumph of Conservatism* 26-56.

can fix it up."[11] Morgan evidently believed that an agreement acceptable to both the government and Wall Street could be reached without resort to the courts. As Wiebe observed, Morgan regarded the federal government as merely one among several autonomous semi-sovereign power blocs in American society.[12] Morgan tended to view Roosevelt as another business rival and felt that he should be treated as an equal by the government. In Roosevelt's words, "Mr. Morgan could not help regarding me as a big rival operator, who either intended to ruin all his interests, or else could be induced to come to an agreement to ruin none."[13] Morgan did not deny the right of the government to take an active interest in the conduct of business, but he assumed that his interests were due as much consideration as those of the government or the public at large.

Roosevelt was not hostile to business in general or to big business specifically, and he even agreed with businessmen that combination was necessary and inevitable. The following statement reflects his attitude toward combinations:

> I am in no sense hostile to corporations. This is an age of combination, and any effort to prevent all combination will be not only useless, but in the end vicious, because of the contempt for law which the failure to enforce law inevitably produces. We should, moreover, recognize in cordial and ample fashion the immense good effected by corporate agencies in a country such as ours . . . .[14]

Nevertheless, Roosevelt did not intend to surrender the sovereignty of the government to private interests, and the case against the Northern Securities Company proceeded to its conclusion, the Supreme Court ordering dissolution in 1904. In order to facilitate the investigation of corporate activities, Roosevelt forced the establishment of the Bureau of Corporations, which was given the necessary powers of investigation.

Arthur Link asserted that "opposition from the big business interests was immense," but Kolko claimed that George Perkins, a partner in the Morgan firm, assured Roosevelt of his

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[11]Mark Sullivan, "America Finding Herself," II *Our Times: The United States, 1900-1925*, at 414 (1926-1933).

[12]Wiebe, "The House of Morgan and the Executive," *supra* note 7, at 50.

[13]Joseph Bucklin Bishop, *Theodore Roosevelt and His Times* 184 (1920), as quoted in Wiebe, "The House of Morgan and the Executive,"*supra* note 7, at 149-50.

[14]*Regulation of Corporations*, H.R. Rep. No. 2491, 59th Cong., 1st Sess. 1 (1906).

approval of the bill.[15] Both accounts are probably correct. The Morgan interests appear to have realized very early that they would have to respect the authority of the law, and they had begun planning the establishment of a rapport between themselves and the government. They hoped for flexible application of the Sherman Act in return for cooperation with the government. Other men of big business might have been somewhat slower to recognize their best interests.

After Roosevelt became president in his own right in the election of 1904, he began to step up his antitrust activities. The Bureau of Corporations began an investigation of the United States Steel Company, in which Morgan interests were involved. Elbert H. Gary, chairman of the board of U.S. Steel, responded by offering to cooperate fully with the government investigation in return for Roosevelt's personal mediation in the case and the protection of confidential information surrendered to the government. In November of 1905, Gary met with Roosevelt in the company of Victor Metcalf, the Secretary of Commerce, and James P. Garfield, the Commissioner of Corporations, to seal the bargain. Gary later said that U.S. Steel had been "absolutely satisfied" with the conduct of the case.[16]

In December of 1906, the Morgan men were prepared when the Bureau of Corporations launched an investigation of the International Harvester Company, another company in which the House of Morgan had interests. The government had been given free access to the files of International Harvester ten days earlier. With the precedent of the U.S. Steel conference still fresh, it was no trouble to arrange a conference for the Harvester Company, and it was not necessary to see Roosevelt in person again. In January of 1907, Cyrus McCormick, president of International Harvester, and George Perkins, the Morgan partner, met with James P. Garfield, who was still the Commissioner of Corporations, to effect an agreement. As a result of the conference, prosecution of the Harvester Company was delayed pending the findings of the Bureau of Corporations.

Because the government had clearly established its ability to prosecute violations of the Sherman Act successfully, it was very much to the advantage of the magnates to be able to cooperate with the government in the investigations of their companies. The Morgan men welcomed the investigation of the Bureau of Corporations in the Harvester case because it

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[15]Link, *American Epoch* 98; Kolko, *Triumph of Conservatism* 70.

[16]Federal Trade Commission, *Memorandum of the First International Harvester Conference*, File 4902-1 (Jan. 18, 1907), as quoted in Wiebe, "The House of Morgan and the Executive," *supra* note 7, at 53.

forestalled prosecution not only by the Department of Justice but also by the states. They also hoped that the investigation would reveal increasing costs of operation and justify price increases while at the same time fending off the attacks of antitrust agitators.[17] The Morgan men felt confident that any irregularities that might be discovered could be resolved through negotiation. Furthermore, the investigation would give the company a semi-official approval that would, they hoped, make it immune to future prosecution.

The Morgan men were eager to avoid the expense, inconvenience, and adverse publicity of prosecution by obtaining an expression of government opinion on the propriety of their activities. Perkins openly expressed this desire in a communication with the Department of Justice in August of 1907. He said that International Harvester expected "the Department frankly [to] come to us and point out any mistakes or technical violations of the law; then give us a chance to correct them, if we could or would, and that if we did, then we would expect the Attorney General not to bring proceedings . . . ."[18]

Roosevelt was not inimical to the proposals of the Morgan men, but he would not commit himself to granting the Harvester Company immunity on the basis of the investigation. All he would do is agree to delay prosecution until the Department of Justice had cleared the action with him—already a normal procedure.[19] During the Panic of 1907, however, Roosevelt found himself unsure what course to take and had to yield somewhat to the position of the Morgan men. In the midst of the panic, U.S. Steel had the opportunity to purchase the valuable property of the Tennessee Coal and Iron Company at a very advantageous price from a brokerage firm that was in financial straits. In order to avoid antitrust prosecution, Elbert Gary and Henry Clay Frick of U.S. Steel traveled to Washington to obtain Roosevelt's approval of the purchase before completing the transaction. Roosevelt was told only that the purchase was necessary to prevent the collapse of an important banking house, a calamity that would further upset the disturbed economy. He was not told that the sale would be a great advantage to U.S. Steel or that the price of the stock was substantially in excess of the amount of cash needed by the brokerage firm to remain solvent. Roosevelt did not question the integrity of his visitors and

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[17]Kolko, *Triumph of Conservatism* 120.

[18]Federal Trade Commission, *Memorandum of the Second International Harvester Interview*,) File 4902-1 (Jan. 19, 1907), as quoted in Wiebe, "The House of Morgan and the Executive," *supra* note 7, at 53-54.

[19]Wiebe, "The House of Morgan and the Executive," *supra* note 7, at 54.

approved the sale. In the aftermath of the panic, Gary proposed that he be allowed to hold a dinner for the leaders in the steel industry at which informal plans could be made to "stabilize" the steel market. The dinner and its successors later proved to lean toward outright price-fixing agreements, but Roosevelt gave his approval of the proposal and stuck by his word.[20]

So satisfactory did the Morgan men find their agreements with the federal government that they desired to write the consultation and negotiation process into law. The so-called Hepburn amendment to the Sherman Act, which Kolko characterized as "virtually the total creation of the House of Morgan," embodied the principles of the procedure that had evolved over the past several years.[21] The bill, which did not pass, would have provided for voluntary registration of corporations with the Bureau of Corporations, to be followed by annual reports of operations, the exact contents of which were to be specified by the Bureau. In return for such voluntary registration and reporting, a company would have the privilege of consulting the Bureau of Corporations on the legality of any proposed activity. The approval of the Bureau would confer immunity from future prosecution. Roosevelt was basically sympathetic to the bill but hesitated to endorse it because it conferred immunity from antitrust prosecution on organized labor.[22] Without the president's support, the bill died in the legislature.

The defeat of the Hepburn bill was more than a defeat for the House of Morgan alone; it was a defeat for all big business. The bill was not, as Kolko asserted, the total creation of the Morgan men, although they were intimately involved in its conception. Big business in general had become politically aware and articulate and had asserted its collective influence in the form of the Hepburn bill. The medium through which this collective influence had been channeled was the National Civic Federation, a most interesting organization.

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[20]Kolko, *Triumph of Conservatism* 114-17.

[21]*Id.* at 134.

[22]*Id.* at 135.

THE NATIONAL CIVIC FEDERATION

The National Civic Federation was, in the words of Gordon M. Jensen, the scholar who has studied it most closely, "a businessmen's reform organization."[23] Founded in 1901 by Ralph M. Easley, a Chicago newspaperman, the National Civic Federation sought out "the best of every community, . . . the representative, public-spirited citizens—the conservative, practical men of affairs."[24] By the middle of 1900, Easley had recruited five hundred such men. Easley's motivation was a concern that the leading men of American society should become involved in solving the important social problems of the day. Because he wanted the organization to represent the consensus of the best opinion to be had from all sources in the country, Easley divided the executive committee into three representative sections: business, labor, and the general public. Many distinguished persons were to be found on the lists of one of the committees during the life of the organization.

The most urgent social question at the time of the establishment of the National Civic Federation was the proper relationship between labor and management. Appropriately enough, the Federation elected Mark Hanna, noted politician and industrialist, as its first president and Samuel Gompers of the American Federation of Labor as vice president. As might be expected from this combination of executive officers, the Civic Federation firmly believed that labor and management should work together in harmony. Great faith was placed in the possibility of working out mutually advantageous arrangements between the working man and the capitalist, who, although apparently antagonistic, had many basic interests in common.

The attitude of the Civic Federation toward labor-management relations is important because it reflected the belief among the members of the Federation that the bitter struggles that had occurred in American society from time to time between antagonistic groups were obsolete and unnecessary. Because all men have basically the same interests, the Federation members believed, almost any apparent conflict of interest could be resolved by the efforts of reasonable men to the mutual benefit of all. As will be shown later, this attitude made the members of the Federation tend to regard unrestricted, cutthroat competition among businessmen as somewhat

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[23]Gordon M. Jensen, *The National Civic Federation: American Business in an Age of Social Change and Social Reform, 1900-1910*, at i (1956) (unpublished Ph.D. dissertation, Princeton University).

[24]Circular letter signed by Ralph M. Easley, Secretary of the National Civic Federation (June 21, 1900), as quoted in Jensen, *National Civic Federation* 31.

uncivilized. With respect to the antitrust problem, they were confident that the best interests of the public and of business were one and the same.

Although the attitudes and policies of the Civic Federation were ostensibly benign, generous, and patriotic, there was a substantial degree of shrewd self-interest involved. As mentioned earlier, the Civic Federation made an effort to encompass leaders from all walks of life, but business was clearly the dominant element that all but controlled policy. The by-laws of the Federation required approval by a majority of each of the three divisions of the executive committee of any action taken by the organization, but the labor division was interested almost solely in labor problems, and the public division lacked the unity to be very effective. Furthermore, the business members of the organization were the only ones capable of contributing financially to its support to any significant degree.[25]

In his study of the Civic Federation, Jensen reached the following conclusion:

> When all was said and done, it was the influence exerted by the business men in the Federation, informing every aspect of its operation, which defined the nature and meaning of the National Civic Federation, with the end result that it became, most directly, the expression of the needs and interests of its business members.[26]

Just as the business members of the Civic Federation dominated the organization, they also dominated the business world. Of 471 businessmen who were active in the work of the Federation from 1900 to 1916, Jensen found men from big business clearly dominant. Of the 471 businessmen who were active, 247 were members of companies listed on the New York Stock Exchange and represented companies of the following sizes:

Number	Company Capitalization
53	More than $100,000,000
80	$10,000,000 to $100,000,000
90	$1,000,000 to $10,000,000
24	Less than $1,000,000[27]

This high level of corporate wealth represented in the Civic Federation was reached at a fairly early date and encompassed a significant portion of the total corporate wealth of the nation. Of the 367 corporations with a capitalization of $10,000,000 or greater in 1903, almost a

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[25]Jensen, *National Civic Federation* 43-49.

[26]*Id.* at 50.

[27]*Id.* at 57.

third were represented in the National Civic Federation.[28] It was not just business, but big business, that spoke through the Federation.

Given the large scale of the interests represented in the Civic Federation, it is not surprising to find that the Federation took a position on the antitrust issue similar to that of the House of Morgan. The two positions were, in fact, synonymous to a great degree because Morgan men played an active role in the Civic Federation. George Perkins, the Morgan partner who was one of the principals in the negotiations with Roosevelt, was very active in the Federation and in time became one of the more articulate spokesmen of the big business interests. Before about 1905, the businessmen of the Civic Federation said very little publicly about the trust issue, but by 1907 they were giving the issue a great deal of consideration, probably in response to the rising tide of progressivism and antitrust agitation.

In 1906 Congress considered, but did not pass, a bill that would have required reports of operation from businesses involved in interstate commerce in order to regulate them. The Civic Federation responded by convening the National Conference on Trusts and Combinations, which met in Chicago in October of 1907. Consistent with its declared philosophy of representing as broad a spectrum of interests as possible, the Federation invited and received delegations appointed by governors, national and state organizations, labor organizations, and local commercial bodies.

Interest in the Conference apparently was significant. Recalling an earlier conference held in 1899 that had been unable to reach a consensus of opinion, the Federation report of the Conference commented, "Public opinion on the subject of trusts has been proceeding at a very rapid rate of late years. . . . There can be no doubt that public opinion on the subject is beginning to crystallize."[29] The progressive movement was developing in earnest.

The tenor of the Conference, as reported by the Civic Federation, indicated a growing awareness of the need to formulate a new approach to the trust problem. Sensing a change of attitude toward the problem, the Federation observed,

> One feature so characteristic of recent discussions of this matter, namely, the wholesale denunciation of the trusts, was conspicuously absent. The

[28] *Id.* at 58.

[29] "Trusts and Combinations: Proceedings of the National Conference," III *National Civic Federation Review* 18 (February, 1908).

> recognition of the services to our industrial development rendered by various forms of combinations was general. . . .
>
> So far, though, as it may be possible to gauge the consensus of opinion of such a body, it may be said that the conference was distinctly in favor of the regulation of trusts and combinations, though details of such regulation presented in the minds of the several speakers a wide variety of form.[30]

It is at least questionable whether a majority of the Conference, and especially the general public that the Conference supposedly represented, would have been willing to tolerate monopolistic trusts and combinations, but the Civic Federation was eager to believe that they would. The magnates of the Civic Federation anxiously hoped that modifications to the Sherman Act in the direction of leniency would soon become politically possible. The Conference was unwilling to go so far. It would do no more than pass a resolution urging Congress to appoint a non-partisan commission to consider the "entire subject of business" and to suggest any necessary changes in the antitrust law.

The Conference also recommended that the operations of corporations large enough to have monopolistic influence be required by law to be made matters of public record.[31] The resolutions of the Conference could easily be construed as support for the program of cooperation that the House of Morgan had been cultivating, but they could also easily be taken as an indication of popular sentiment in favor of investigating and eradicating all strongholds of economic privilege. The resolutions were sufficiently ambiguous to be all things to all men.

More important than the opinions of the Conference was the opportunity that the event gave to the Civic Federation to express its own views. The Conference authorized the Federation to present the resolutions to Congress, which the Federation did in January of 1908. As a result, the Federation delegation received an unexpected invitation to propose a bill incorporating the resolutions. Seth Low, president of the Federation, took charge of preparing the bill and created an informal committee to assist him. On the committee, among others, were Elbert H. Gary of U.S. Steel, George W. Perkins of the Morgan Company, and Samuel Gompers of the AFL.

The bill, which was the Hepburn bill already mentioned, was not simply the result of the resolutions of the Conference but reflected the views of the Civic Federation and was presented

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[30] *Id.*

[31] *Id.* at 20.

on behalf of the Federation only.[32] As explained earlier, the bill would permit the voluntary registration of corporations with the Bureau of Corporations in return for which the companies could demand an official opinion from the Bureau on the legality of proposed combinations or agreements. The opinion, if favorable, would confer immunity from antitrust prosecution. Criminal penalties were provided for proceeding against the direction of the Bureau. The support of the AFL was obtained in return for a clause that exempted labor organizations from prosecution under the Sherman Act.

The assumptions and aims underlying the Hepburn bill are apparent from Low's testimony on behalf of the bill before the House Committee on the Judiciary in April of 1908.

> There is scarcely a line of commercial business, if there be even one, in which combinations in restraint of trade are not sometimes desirable in these days in the public interest, no less than in the interest of trade; for modern business is very complex, and its problems are often trade problems, as distinguished from individual problems. . . .
>
> Even a law of the United States, powerful as this country is, cannot set aside the universal law that leads men in these days to combine, and which leads men to do so precisely in proportion as they are free. . . .
>
> As further aggravation of the situation, the antitrust law is a penal one. Yet no one is able to be sure as to certain agreements whether they are unlawful or not. . . . [This situation] leads to a wide disregard of this statute upon the theory that 'necessity knows no law'; because business to be done at the present time must be done by modern methods and these often involve some restraint of trade.[33]

Low suggested several remedies for the problem. Repeal of the Sherman Act would be desirable, he said, but he concluded that "public opinion would not tolerate it."[34] Modification of the Sherman Act might also work, but any significant revision would probably look too much like repeal to suit the public. The only possible alternatives, which the Hepburn bill embodied in principle, would be federal regulation of interstate business through either federal incorporation or federal license of interstate trade. The Hepburn bill would, Low felt, test the practicality of these two alternatives.

The most important assertion that Low made was that combinations in restraint of trade were both necessary and inevitable. He declared that such combinations were often in the public

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[32]"Shall the Anti-Trust Act Be Amended?," III *National Civic Federation Review* 1 (May, 1908).

[33]*Id.* at 2.

[34]*Id.*

interest and, by implication, should be allowed. The Sherman Act served only to confuse business in its ambiguity of application. The Hepburn bill would apply the whip of publicity to control the behavior of corporations with flexibility. Those combinations that were supposedly in the public interest would be seen to be such under the close inspection of the Bureau of Corporations and would not be prosecuted. Low asserted that there was a basis in the common law for distinguishing between "reasonable" and "unreasonable" contracts and agreements and that this test could be applied to business combinations.[35]

Commissioner of Corporations Herbert Knox Smith, who had often displayed an obvious partiality, supported Low. He reasoned that since contracts at common law were judged on the basis of reasonableness, the Sherman Act placed undue restraints on the right to make contracts because it outlawed all contracts of a certain kind regardless of reasonableness. Assuming that the Sherman Act was a regulatory scheme rather than a prohibitive measure, Smith asserted that an agency specializing in the administration of the Sherman Act was imperative for the proper fulfillment of the law.[36] Between them, Low and Smith touched upon almost every point of what would become the standard policy of the National Civic Federation on trust reform. The themes and arguments in their testimonies re-appear time and again in the Civic Federation literature of the succeeding years.

The Hepburn bill failed to pass, but the magnates did not give up their campaign once it was under way. They began to speak out in favor of their position on trust regulation more often. During the time when the Hepburn bill was being formulated, George Perkins had delivered an address at Columbia University in which he vigorously defended the corporate form of business. According to Perkins, the corporation was as natural and commendable a form of organization as the structure of churches, society, and the universe. He pointed out the benefits society received from mass production. Acknowledging that abuses of the corporation

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[35]*Id.* Low was not entirely consistent in his position on the utility of the test of reasonableness. In testimony before a subcommittee of the Senate Judiciary Committee, he opposed, as an alternative to the Hepburn bill, another bill (S. 6331) that would have restricted the application of the Sherman Act to combinations in unreasonable restraint of trade or competition. He complained that "[n]o one knows, and no one can say in advance in any particular case, what is reasonable and what is unreasonable." *Amendment of the Sherman Antitrust Law: Hearings on S. 6331 and S. 6440 Before the Subcomm. of the Senate Comm. on the Judiciary,* 60th Cong. 10 (1908). Low's inconsistency indicates that a consultative bureau with which business could negotiate as with Roosevelt's men was as important to Low as legal relaxation of the Sherman Act. Reasonableness that had to be demonstrated in court in every instance would not have been of much value to business.

[36]"Amendment of the Anti-Trust Act," III *National Civic Federal Review* 4 (September, 1908).

occasionally occurred, he asserted that the corporation should be regulated rather than destroyed because it was too valuable to society to abolish altogether.

In discussing the use of publicity as a regulatory device, Perkins declared that corporations were bound by moral obligation to demonstrate to the investing public that the company was being conducted on a sound and honest basis. He also asserted that corporations should welcome the regular inspection of an officially constituted government body that would assure the public of the integrity of the corporation.[37] In his testimony before the House Judiciary Committee, Seth Low also touched on the same point: "Much of the criticism of people at large is due to the fact that they do not understand corporate methods or corporate procedure. There is much reason to believe that publicity will make the criticism of corporate undertakings more intelligent, and therefore, in the main, more friendly."[38]

The abuses of big business were beginning to generate increasingly hostile public opinion, and the magnates were trying frantically to change their public image. Attempting to justify the collaborative practices of Wall Street, Perkins went a step beyond his defense of the corporate form to a defense of restraint of competition. He declared that the competitive system was erratic, giving ruinously low prices at one time and unfairly high ones at another. In the future, business would have to be more orderly. "The spirit of co-operation is upon us," he said, "It must, of necessity, be the next great form of business development and progress."[39]

But the public paid little heed, and the government also turned a deaf ear. President Taft neither understood nor appreciated Roosevelt's policy toward big business and began to prosecute combinations with unprecedented vigor. The big business interests could not afford to capitulate and so re-doubled their efforts. By 1910 Seth Low, still president of the Civic Federation, was insisting that federal incorporation was not only desirable but a necessity. He criticized the states for competing among themselves for business by establishing ever more lenient incorporation laws, blaming them rather than the corporations for the abuses that resulted.

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[37]George W. Perkins, "The Modern Corporation," an address delivered at Columbia University, 1-15 (Feb. 7, 1908).

[38]"Shall the Anti-Trust Act Be Amended?," *supra* note 32, at 2.

[39]Perkins, "The Modern Corporation," *supra* note 37, at 16.

The inconsistency of state laws was a double dilemma for corporations doing interstate business. A company incorporated in a state with fairly strict laws often had trouble competing with another company that was allowed to conduct a rather loose operation, and a company could never be sure when it might be sued by a state even though it had conformed to the laws of its parent state. The larger corporations, therefore, tended to look to the federal government as the proper source of corporate regulation, but they were unwilling to accept federal regulation in just any form. As Low insisted in his article, some degree of cooperation and restriction of trade had to be accepted as essential to the operation of modern business before big business would in turn accept regulation. Because the public would not allow repeal of the Sherman Act, some modification of its enforcement had to be made. National incorporation, Low felt, was the best solution.[40]

As the presidential campaign of 1912 approached, the Civic Federation members became even more vocal and emphatic in behalf of their interests. By 1911 George Perkins had begun an undisguised attack on the competitive system.

> We are living now in a get-together period; . . . whether we like it or whether we do not like it, we have got to cooperate. . . .
>
> The intensity with which business is being done, with which all people are drawn close together today makes competition the most deadly sort of game. We can go on and play it, if we want to, but the result will be so disastrous that we will have to give it up in the end.[41]

He was willing to risk the dangers of government control for the benefit of government approval of restraints of competition: "There can be easily too much government regulation, but I don't see how it is possible to go on with unregulated competition."[42]

Edgar A. Bancroft, counsel for International Harvester, was in agreement with Perkins. He asserted that destruction of big business was a violation of property rights and that, in any case, it often failed to prevent restraint of trade. He pointed with approval to a new Canadian law on combinations that followed the Australian example by making the effect on public

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[40]Seth Low, "The Necessity of National Incorporation of Companies Doing Interstate Business," III *National Civic Federation Review* 17 (March, 1910).

[41]George W. Perkins, "Federal Regulation of Corporations," *Eleventh Annual Meeting of the National Civic Federation* 241-42 (1911),.

[42]*Id.* at 243.

interest the criterion for assessing legality. He recommended a federal incorporation law to be administered by a government commission.[43]

In the spring of 1912, a presidential election year, Perkins took his case directly to the public in an article in the *Saturday Evening Post*.[44] In the article he pointed out that the banking and railroad industries were allowed to consolidate under government supervision. He further asserted that competition was restricted in the public interest by these consolidations. The use of the great competitive weapon of the railroads, the rebate, was denied to them because of its destructive effect on both the railroad industry and other sectors of the economy. The Republican Party under Roosevelt, Perkins said, had pursued a policy of regulating business after the manner of regulating railroads and banks, but under Taft's administration the responsibility had been abdicated to the courts by asking them to adapt the antiquated Sherman Act to modern business conditions.[45] Striking another blow at the time-honored system of competitive business, Perkins characterized it as selfishly motivated as compared to cooperation in a regulated, public-minded fashion.

Calling for reform of the antitrust policy of the government, Perkins urged the establishment of a business court or controlling commission composed of businessmen. This commission would be empowered to license interstate trade, the license being subject to regulations established by the commission and Congress. Publicity and inspection would be the chief tools employed by the commission in policing business, and violations would be charged against the individuals responsible for committing them. The corporation would not be destroyed for an infraction of the law. Furthermore, the commission would render legal advice to companies in order to forestall unintentional violations. The Sherman Act would be employed only on the recalcitrant.[46]

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[43]Edgar A. Bancroft, "Federal Regulation of Trusts," *Eleventh Annual Meeting of the National Civic Federation* 241-42 (1911),.

[44]George W. Perkins, "Business and Government," *The Saturday Evening Post* 22-23 (Mar. 16, 1912).

[45]The decisions of the Supreme Court in the *Standard Oil* and *American Tobacco* cases, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), which established the "rule of reason" as a test of the legality of business combinations, would seem to satisfy this particular complaint. As has already been mentioned, however, mere leniency in application of the Sherman Act was not enough. The men of big business wanted laws and procedures that would help them avoid the courts entirely. They wanted more than relaxation of negative restraints; they wanted positive assistance.

[46]Perkins, "Business and Government," *supra* note 44.

It is clear from Perkins' article that the members of the community of big business were taking an active interest in the election of 1912. Their very existence seemed to be at stake. Taft had proved to be a bitter disappointment in his policy on trust regulation, and Woodrow Wilson was campaigning on a platform calling for the vigorous prosecution of trusts. The trust issue was very important in the campaign of 1912 and warrants inspection here.

By 1912 Taft had lost most of the support of the business interests of his party and did not stand a chance of re-election. The two major contenders—Theodore Roosevelt, the Progressive candidate, and Woodrow Wilson, the Democrat—chose to fight the campaign primarily on the trust issue.

Roosevelt's philosophy had been developed during two terms as president and was fairly mature. He believed in the inevitability and the potential social value of big business, and he proposed to prevent its abuses through a program of both patronage and regulation by the government. Big business would be encouraged and protected by the government, but it would also be made to serve the interests of the majority, not simply the interests of a few great capitalists. This program was to be implemented by a "strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in inter-State commerce . . . ."[47] The commission would have the responsibility of maintaining publicity of corporate transactions and of helping businessmen stay on the right side of the law.[48]

Wilson's program, the New Freedom, might be described as the Jeffersonian counterpart of Roosevelt's Hamiltonian program. Wilson called for vigorous prosecution of trusts and a return to freely competitive business, which was supposed to re-establish the individual opportunity that the trusts had allegedly destroyed. Wilson was a believer in minimum government interference in private affairs and felt that the government should do no more than exercise those police powers necessary to the maintenance of order and the preservation of individual rights. He had no intention of patronizing business or any other interest within American society.[49]

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[47]Kirk H. Porter, *National Party Platform* 341 (1924).

[48]*Id.*

[49]Woodrow Wilson, *The New Freedom* (1913), a compilation of Wilson's campaign addresses that

Wilson has often been maligned by historians with respect to his antitrust philosophy. One critic claimed that Wilson was duped into betraying his original policy when it eventually came to writing it into law.[50] Kolko asserted that Wilson never had a program, the New Freedom being simply a campaign device full of inconsistencies. According to Kolko, Wilson was unable to define the difference that he declared existed between big business and trusts.[51]

These accusations are both unfair and misleading. Even a cursory reading of *The New Freedom* reveals that Wilson had clear and consistent ideas about the trust problem. Wilson felt that legitimate big business came into being by operating more efficiently than its competitors. Big business was, therefore, desirable. Trusts, on the other hand, came into being by the collusion of men bent on suppressing competition for their own selfish purposes. Trusts were inefficient and could not exist in a freely competitive atmosphere. They should be destroyed. Wilson's thought on the subject is perhaps best presented in the following passage:

> A trust is an arrangement to get rid of competition, and a big business is a business that has survived competition by conquering in the field of intelligence and economy. A trust does not bring efficiency to the aid of business; it *buys efficiency out of business*. I am for big business, and I am against the trusts.[52]

It should be clear that Wilson was not committed to a nation of *petit-bourgeois* shopkeepers, but the image persists. Nor was his position the result of a hasty campaign strategy. Kolko pointed out to the detriment of his own argument that Wilson explicitly opposed unrestricted antitrust prosecution in 1910.[53] Wilson's program was well balanced and potentially appealing to a broad audience, from the sworn enemies of the trusts to the men of big business.

The Progressive Party platform was clearly more appealing to big business, however, and was, in fact, practically the embodiment of the big business philosophy. Even so, the magnates did not line up in support of Roosevelt. After becoming an integral part of, even a driving force within, the Progressive coalition, big business split its ticket at the crucial moment. George Perkins did indeed join the Roosevelt movement, and he became a leading Progressive.

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expresses Wilson's early political philosophies.

[50]Nelson B. Gaskill, *The Regulation of Competition* 27-44 (1936).

[51]Kolko, *Triumph of Conservatism* 233.

[52]Wilson, *New Freedom* 180.

[53]Kolko, *Triumph of Conservatism* 206.

The House of Morgan, on the other hand, stood by its Republican tradition and contributed heavily to the Taft campaign. Another of the Morgan circle, Cyrus H. McCormick of International Harvester, was found in the Wilson camp. How was such a split possible if big business was to any degree united in its goals and interests?

Roosevelt, as has been pointed out, had the program that most closely coincided with what the leading spokesmen of big business had been saying about the antitrust question. Many staunch business Republicans, however, might have felt that it would be better to support Taft, as objectionable as he was, than to split the party and lose the election to the Democrats by supporting Roosevelt. Still other businessmen might have realized that a Republican split and defeat were inevitable, and as Kolko suggested, supported Wilson as a foil to William Jennings Bryan, whose antitrust policy would almost certainly have been a nightmare for big business.[54] Wilson's policy was, after all, potentially favorable to big business because Wilson rejected the notion that mere bigness alone was bad, and he was, in addition, a strong believer in limited government interference in domestic affairs.

In the end, Wilson's program proved to have the greatest appeal for the greatest number of voters. Big business was not to find itself pampered during the next eight years, but neither was it to be abused. For a while there apparently was some degree of bitterness among those of the business community who had followed Roosevelt. It must have appeared to them that the country had rejected their earnest assertions that there were numerous virtues in big business. They anticipated a major attack on their interests at any moment. In the early part of 1914, George Perkins appeared before the Lincoln Day Dinner of the Progressive Party to berate both of the rival parties for their trust policies. He asserted that "[t]he leading asylums in this country for those industrially blind and industrially deaf are the Republican and Democratic Parties. They can see nothing good that has been accomplished by the trusts. They can only appoint committees and spend money to investigate for crime and misdemeanor."[55] Perkins did not realize it then, but help was soon to come.

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[54]*Id.* at 205.

[55]George W. Perkins, "National Action and Industrial Growth," an address delivered before the Lincoln Day Dinner of the Progressive Party, 7 (1914).

THE FEDERAL TRADE COMMISSION

The trust issue came to the fore in Congress during the second year of Wilson's presidency. Hearings on the issue had been in progress even before Wilson announced his candidacy, but the final settlement took place under his administration. The settlement came in the form of the Clayton Act and the Federal Trade Commission Act.

Wilson apparently intended to make the Clayton Act the heart of his antitrust reform program. He expected the Act to define explicitly and unequivocally what conduct would be deemed unlawful. In *The New Freedom* Wilson had said, "Everybody who has even read the newspapers knows the means by which these men built up their power and created these monopolies. Any decently equipped lawyer can suggest to you statutes by which these men can be stopped."[56] In his address before a joint session of Congress on January 20, 1914, he said,

> Surely we are sufficiently familiar with the actual restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.[57]

With the law clearly defined by the Clayton Act, a trade commission would be established as an aid to businessmen who wanted to avoid unintentional violation of the law.

> The businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.
>
> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the process of the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.[58]

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[56]Wilson, *New Freedom* 172.

[57]*Trusts and Monopolies: Address of the President of the United States before the Joint Session of Congress, January 20, 1914*, H.R. Doc. No. 625, 63rd Cong., 2nd Sess. 6 (1914).

[58]*Id.*

Wilson envisioned a commission that would be able to give business authoritative advice and to render other assistance to business in its legitimate pursuits, but he had no intention of allowing restraints of competition in any form.

The program that Wilson described sounded good in theory, but in practice it proved impossible to implement. Progressives objected to any attempt to give strict definitions to antitrust offenses, and agreement as to precisely what constituted an offense was impossible to attain in any event. The problem was too complex to be clearly defined for every particular case. As it became increasingly more obvious that the Clayton and the FTC bills could not pass in their original forms, a small group of men prepared a bill that they thought would solve the dilemma. Congressman Raymond B. Stevens of New Hampshire, who was a member of the House committee that was considering the trade commission bill, asked his friend George Rublee, who was a member of the Progressive Party and also a member of the trust committee of the U.S. Chamber of Commerce, to prepare the substitute bill. Rublee's bill was designed to replace the controversial definitions section of the Clayton bill. It declared that "unfair competition" was unlawful, and it gave the trade commission the power to issue complaints and cease-and-desist orders. In early June the new bill was presented to Wilson by the group, which now included Louis D. Brandeis, Wilson's trusted adviser on economic matters.[59]

The effect of the visit on Wilson was soon evident. On June 10, 1914, he informed supporters of the new measure that he would support their bill. With Brandeis acting as liaison, the Senate Committee on Interstate Trade, which had the original bills as passed by the House under consideration, was informed of Wilson's desire that the trade commission bill be amended along the lines proposed by Rublee. The Senate committee, being one of the sources of opposition to a weak, investigative commission, readily complied. After several weeks of debate, the bill emerged from the Senate with the amendment intact. Wilson urged and obtained its passage in the House. Because the trade commission had come to embody all the essential features of Wilson's trust reform program, the Clayton bill was left to the mercies of its

[59]George Rublee, "The Original Plan and Early History of the Federal Trade Commission," XI *Proceedings of the Academy of Political Science* 668 (1924-1926).

opponents in Congress. It was passed shortly after the Federal Trade Commission bill, but in a greatly weakened form.[60]

The heart of the FTC Act lay in Section 5, which stated that "[u]nfair methods of competition are hereby declared unlawful." The Commission was "empowered and directed" to prevent the use of such unfair methods in commerce by the issuance of cease-and-desist orders that were enforceable by the federal courts. Section 6 gave the Commission the power to investigate the conduct of corporations, to make such findings public if in the public interest to do so, and to propose, at the request of the Attorney General, plans for the re-organization of companies accused of violating the antitrust laws. The Commission was also given the power to subpoena witnesses and documentary evidence in its investigations, criminal penalties being provided for failure to comply.

Parties accused of violations had the right to a hearing before the Commission and before the enforcing court, if they so desired. No one could refuse to comply with a subpoena issued by the Commission on the grounds that his testimony would incriminate him, but no testimony given before the Commission could be used to prosecute the witness. The integrity of confidential information in the hands of the Commission was protected by a criminal penalty to be imposed on any member of the Commission or its staff who made unauthorized disclosures of such information.[61]

The Commission that the new law established was much more like the regulatory commission described in the Progressive platform than the weaker administrative commission that Wilson had at first envisioned. Wilson has even been accused of capitulating to the stiff opposition that developed to the original plan for the Commission and naively assuming that the new plan was essentially the same thing as the old. He did not, according to this view, realize the significance of the differences that existed between the Commission as originally planned and the final version.[62]

This accusation is reasonably founded but will not survive close inspection. Arthur Link has demonstrated very convincingly with excerpts from Wilson's correspondence that Wilson

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[60]Link, *Wilson: The New Freedom* 434-41.

[61]Text of the Federal Trade Commission Act, as printed in Gerard C. Henderson, *The Federal Trade Commission* appendix (1926).

[62]Nelson B. Gaskill, *The Regulation of Competition* 1 (1936).

recognized the difference between the two proposals and deliberately chose one over the other after careful consideration.[63] Furthermore, there is evidence that Wilson began actively pursuing a policy toward business that was strongly reminiscent of Theodore Roosevelt's. In an address before the annual convention of the U.S. Chamber of Commerce in 1916, Wilson urged businessmen to make greater use of the FTC, stating that "[i]t is not an instrument to generate friction but an instrument to avoid friction, an instrument to accommodate all the forces of this country so that they can cooperate with one another with the greatest possible energy and the least possible inconvenience."[64]

This speech might perhaps be at least partially discounted as an election-year maneuver, but there is further evidence that a fundamental change of policy was taking place in the Wilson administration. Shortly after the establishment of the FTC, Joseph E. Davies, past Commissioner of Corporations and new chairmen of the FTC, said, "In recent years . . . there has been evolved a new agency for executive and quasi-judicial function in government. . . . It was in consonance with this development that the conception of the Federal Trade Commission was advanced."[65] Three years earlier it would have been almost inconceivable that Wilson would ever countenance such a fundamental extension of government power.

Unquestionably, the FTC Act was a victory for big business and the Progressive policy, but how great a victory? It is not difficult to compare the hopes and expectations of big business with the actual law because the magnates had left little doubt as to where they stood on the issue of a commission. The National Civic Federation was especially responsive to the prospect of a major addition to the antitrust laws. On February 4, 1914, early in the development of the Clayton and the FTC bills, Seth Low appeared before a Congressional committee to voice his opposition to any attempt at strict definition of antitrust offenses. Addressing the House Judiciary Committee, he said,

> I confess . . . a certain feeling that it is not altogether wise to attempt to add definitions to the Sherman law; partly because . . . of the many litigations under it its meaning has become pretty definite already; and partly because . . . it is very

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[63]Link, *Wilson: The New Freedom* 438.

[64]Woodrow Wilson, "The President's Message to Business Men," IV *The Nation's Business* 18 (February, 1916) (an address delivered at the Fourth Annual Meeting of the Chamber of Commerce of the U.S.).

[65]Joseph E. Davies, "The Federal Trade Commission," III *The Nation's Business* 28 (February, 1915).

> difficult to define, and it is better to leave the language of the law in general phrases.[66]

Low said that specific definitions tended to penalize the corporation rather than to accomplish the desired end of preventing unfair competitive practices. He recommended as an alternative a commission to administer the antitrust laws.

The inconsistency between Low's statement in 1914 and his testimony in 1908 on the sufficiency of the Sherman Act as a legal standard for combinations is indicative of his ultimate aims. In 1908 Low had asserted that the Sherman Act was unclear and should be modified. In 1914 he testified that the Sherman Act and the interpretation it had been given by the judiciary were adequate and that no further clarification was necessary. The only important development in the interpretation of the Sherman Act during the time between the two testimonies was the proclamation of the rule of reason by the Supreme Court in the *Standard Oil* and *American Tobacco* cases. As important as this development was, it should not have affected Low's opinion significantly because he had specifically rejected the test of reasonableness in 1908 as too ambiguous to be of practical use.

Low did not want to depend on the rule of reason because doing so would mean that every questionable case would have to be litigated with much attendant expense and unfavorable publicity. Yet the rule of reason was preferable to strict definitions of offenses because strict definitions would eliminate all chance of passing off collusive combinations as reasonable or beneficial to the public interest. What Low and the big business interests he represented really wanted was not only legal approval for a certain amount of combination among competitors but also a regulatory commission with the authority to decide which combinations would be permitted. Because the negotiations that were conducted during Roosevelt's administration had been so satisfactory to the magnates, big business wanted to confine antitrust regulation to a specific agency of the executive branch and to avoid the courts and the public, both of which had proved to be rather unsympathetic to big business. There was no guarantee that regulation by a commission would be more advantageous to big business than was the old procedure of enforcement of restrictive legislation through the courts, but the potentialities of regulation by a

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[66]*Hearings on Trust Legislation Before the House Comm. on the Judiciary*, 63rd Cong., 2nd Sess. 309-10 (1914).

commission were all to the advantage of big business. The old system plainly would not do. It was putting the magnates out of business.

Attempting to swing the course of the new legislation in the favor of its business members, the National Civic Federation prepared a bill for the establishment of a trade commission and submitted it to the House Judiciary Committee. In order to overcome the problems caused by the lack of uniformity in state corporation laws, the bill would have required the larger corporations dealing in interstate commerce to obtain a federal license. The license feature was compared to the control over banks that the newly established Federal Reserve Board had been given. No changes in the Sherman Act were proposed in the bill. The proponents of the bill believed that the commission would be able to administer the antitrust law on the basis of the reasonableness of a combination and its effect on the public interest, much as the Interstate Commerce Commission regulated railroads.[67] Big business fervently hoped to escape the threat of immutable restrictions by submitting itself to a regulatory commission that could formulate and alter standards of behavior to suit circumstances and the political climate.

The Federal Trade Commission Act clearly represented a major ideological victory for big business and the Progressive Party, which had championed the cause of a regulatory commission, but the substance of the victory was more apparent than real. The specific definitions to which Seth Low had objected were gone, but they had been replaced by a general term that did little to alter the old interpretations of the Sherman Act. The FTC was a regulatory commission of a sort, but it had no clear power to administer the law in any fashion other than that already established by the courts. It had no authority to grant exemption from the Sherman Act to combinations on the grounds that their restraint of trade was in the public interest or even to advise a company in advance of the legality of some proposed measure. The FTC might choose not to prosecute a combination of its own initiative, but it could not control the activities of the Department of Justice, which was free to prosecute any combination it saw fit. Any flexibility in the application of the Sherman Act would still have to originate with the president and the policy he prescribed for his Attorney General, but even the president could not control the Supreme Court, which still had the final word on the meaning and effect of the antitrust laws. About all the FTC added with certainty to the system of antitrust law enforcement was an

[67]"For an Interstate Trade Commission," IV *National Civic Federation Review* 5, 20 (March, 1914).

agency that could specialize in the antitrust laws and enforce them without necessarily resorting to the lengthy and costly process of litigation.

Potentially, through the mutual agreement of the Supreme Court, the Justice Department, and the FTC, the Commission could become a true regulatory agency with the prerogative to interpret the law after the fashion of the Interstate Commerce Commission. Such a development could occur through the evolution of administrative practice and, given Wilson's newly progressive outlook, was a distinct possibility. Before the necessary precedents could be established, however, America entered the war then raging in Europe and became much too engrossed with the problems of war-time production to worry about peace-time antitrust policies. The experiment in progressive regulation of business had to await the salvation of democracy.

By reason of their great economic power and their political activism, the relatively small number of men in the community of big business were able to exert a major influence on the legislation of their times, but they were not the only members of the business world who were politically influential. Businessmen ranging from manufacturers of moderate wealth to small-town retail merchants also concerned themselves with the antitrust issue during the progressive era. These latter ranks of businessmen vastly outnumbered the magnates in voting power and so were of real importance in the political debates of their day. Although the programs of the National Civic Federation usually enjoyed the support of the American Federation of Labor, organized labor had yet to acquire the massive voting strength that it exercised in later decades. The Civic Federation and its allies alone thus could not effect significant changes in the law of the land. Important also were the wishes of the large number of businessmen of lesser rank.

In addition, it was the businessmen of small and moderate enterprises who were to set the pace for American business to an increasing extent as the century grew older. The magnates who contended with Theodore Roosevelt and carried the progressive standard were among the last of a vanishing breed. The country would never again see men of the caliber of Andrew Carnegie, John D. Rockefeller, and J.P. Morgan. Control of big business passed into the hands of less flamboyant professional managers. More moderate-sized businesses began to regain the importance they had lost to the mammoth combinations. The following table, which describes the distribution of companies in the nation according to the value of their annual sales, provides some indication of the shift to medium-sized businesses.

Value of Annual Sales[68]

	Greater than $1,000,000	$1,000,000 to $100,000	$100,000 to $20,000	$20,000 to $5,000
1904	1.3%	15.3%	33.2%	50.2%
1909	1.7%	15.9%	32.7%	49.7%
1914	2.1%	16.9%	31.8%	49.2%
1919	4.5%	21.8%	34.7%	36.9%
1923	5.2%	26.3%	36.9%	31.8%

[68]Magnus W. Alexander, *The Changing Environments of American Industry and The National Industrial Conference Board* 7 (1926) (Tenth Annual Report of the President of the National Industrial Conference Board).

This table clearly indicates a significant gain in the importance of moderately large companies (those with annual sales of $100,000 to $1,000,000) at the expense of the very small. The evidence of this table, which represents only one way of measuring the size of companies, is substantiated by another study based on the number of workers employed per company. The employment study found that there was little tendency toward production on a larger scale during the period covered by the above table. Instead, the tendency was for the extremes to move toward the middle, concentrations developing around twenty and one hundred workers per company.[69]

Although the number of great corporations rapidly increased—four-fold, in fact, they were going from extremely few to very few. The dominant fact of the period in question was a substantial reduction in the tendency of business to polarize into very large and very small interests. It was the age of the man in the middle. As they grew in numbers, the men of medium-sized businesses became more aware of their combined strength and began to play a greater part in shaping the course of society. They became the direct heirs of the progressive era and were the ones who determined, by actual practice, to what extent the economic heritage of progressivism was absorbed into American business. No analysis of the issues of 1912 can be complete without an examination of the ideas and interests of these men, the men of medium-sized businesses, who were most directly responsible for the fate of the heritage of 1912.

Like the magnates, the businessmen of moderate means had an organization through which they expressed their opinions. Their organization was the National Association of Manufacturers, usually referred to as the NAM. The members of the NAM were typically, as one author has put it, "well-to-do, independent manufacturers."[70] A study of the sort done on the business interests of the members of the National Civic Federation, when applied to the NAM, supports this characterization. The following table reveals the size of companies, as indicated by their capitalization, represented on the executive board of the NAM over a ten-year period.

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[69]Willard C. Thorp, "The Changing Structure of Industry," I *Recent Economic Changes in the United States* 216 (1929).

[70]Wiebe, *Businessmen and Reform* 13.

Number of Companies Falling Within
Given Ranges of Capitalization[71]

	Greater than $10,000,000	$10,000,000 to $3,000,000	$3,000,000 to $1,000,000	Less than $1,000,000	Figures unavail-able
1910	-	3	2	1	14
1915	-	2	5	3	9
1920	3	2	4	1	10

Those companies listed in the "Figures unavailable" column were probably either very small corporations or unincorporated firms.[72]

A comparison of the above table with the earlier table relating to the National Civic Federation clearly reveals that the men of the NAM represented businesses of considerably lesser size than the businesses represented by members of the Civic Federation. The men of the NAM appear to have fallen within the range of the business interests that were growing most rapidly in relative importance, but there is no way of establishing a direct correspondence.

The decline of the National Civic Federation after 1916 and the concurrently increasing vigor of the NAM are more concretely indicative of the status of the members of the NAM with respect to the rest of the economy. The progressive movement had spent much of its original energy by the time the United States entered the First World War, and the Civic Federation similarly found itself somewhat spent. During the war the Civic Federation became inactive. Its revival after the armistice found it converted into a reactionary organ interested in little more than the protection of American traditions from all sorts of imagined or exaggerated threats. The Civic Federation continued to exist, although inconspicuously, until the death of its founder, Ralph Easley, in 1939, when it too passed into history. The NAM, by contrast, survived and was even strengthened by the war, and the NAM continued to be an active, vocal organization through the 1920's and thereafter The magnates of the Civic Federation were on the way out; the independent manufacturers of the NAM were on the way in.

What were these men who were on the way in thinking, saying, and doing? The opinions of the men of the NAM are difficult to characterize because they were not so uniform

[71]X, XV, and XX *Moody's Manual of Railroads and Corporation Securities*, *passim* (1900-1925).

[72]One company, the American Injector Company, was not listed in *Moody's Manual* for any year but was found in another source to have been incorporated in 1915 with a capitalization of only $200,000. *Standard Corporation Service* 1437 (1915).

as those of the Civic Federation members, nor were they always consistent. Furthermore, the NAM did not concern itself with the trust problem so much as did the Civic Federation. The problems posed by the labor movement were of much greater concern to the members of the NAM than the trust issue. In 1902 three tough-minded Midwestern manufacturers, David M. Parry, John Kirby, Jr., and James W. Van Cleave, had seized control of the NAM in the annual convention and had converted it from a quiet organization for the promotion of American trade interests overseas to a vigorous organ for championing the open shop.[73] On through the 1920's, the NAM continued to make opposition to organized labor one of its primary functions.

The Civic Federation, it will be recalled, had as one of its primary goals cooperation between capital and organized labor. The differences in policy concerning labor aggravated the differences already existing between the NAM and the Civic Federation, and the two organizations lost little love on each other. The Civic Federation repeatedly attacked the NAM as representative of only narrow and parochial small businesses.[74] The NAM reciprocated with similar compliments. In his annual address of 1911, NAM president John Kirby, Jr. told the members of the NAM, "If the doctrines of industrial freedom, for which the National Association of Manufacturers and cognate organizations stand, are right, then the makeshift expediences for which the National Civic Federation purports to stand must logically be wrong." He went on to denounce the Civic Federation for its support of organized labor, especially the ally of the Federation, the American Federation of Labor, for which he had the following to say: "The American Federation of Labor is engaged in an open warfare against Jesus Christ and his cause. Analyze it as you may you can make nothing else out of it . . . ."[75] It cannot be expected that either the NAM or the Civic Federation would gratuitously support the interests of the other.

Yet in 1903 the NAM took a position on antitrust reform that was potentially favorable to the interests of the magnates in the Civic Federation. NAM president David M. Parry reminded the members of his organization that large-scale industry had many virtues despite its more apparent faults.

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[73]Wiebe, *Businessmen and Reform* 25-26.

[74]Jensen, *National Civic Federation* 64.

[75]John Kirby, Jr., "President's Address," National Association of Manufacturers, *Proceedings of the Sixteenth Annual Convention* 85-86 (New York, 1911) [hereinafter NAM, *Sixteenth Convention*].

> At the present time any corporation that is classified as a trust is made the subject of reckless and demagogic criticism, and, while it appears that monopoly may be justly regarded as a danger signal of trust development, yet it should be borne in mind by thoughtful men that industrial combinations are along the lines of progress. As a fundamental fact, it may be stated that the larger the aggregation of capital invested in any one enterprise, the cheaper will be the cost of production.[76]

Parry apparently realized that it would not be long before many of the small manufacturers he represented would want to combine or expand their facilities in order to realize the benefits of mass production. A strong antitrust policy might well stifle the economic growth of moderate enterprises. Parry was anxious that his members keep all aspects of the antitrust issue in mind lest they be tempted to support unrestricted "trust-busting" out of spite for their larger business rivals.[77] The interests of the NAM would be best served, in the long run, by a moderate antitrust policy as opposed to either a strict one, which would destroy all large business combinations, or a lenient one, in which the giant corporations might find protection and support.

It was not long before the NAM began to exhibit a budding interest in the possibility of modifying the antitrust laws, but the Association was very hesitant to commit itself in favor of change. In 1905 the NAM Committee on National Incorporation stated in its report that federal incorporation might be a good solution to the problems of monopoly and trust regulation, but the committee was reluctant to endorse the idea for fear of government paternalism and centralization. The report advised only a wait-and-see attitude.[78] The report of the next year said little more. It concluded only that the problem was indeed a difficult one and would eventually be solved. For the moment, the committee wished to retain the right to examine any proposal before committing itself.[79] By 1909 the committee had decided that federal incorporation might truly be a very plausible way to solve the inconsistencies of state laws but that it could never be used because it was unconstitutional. Much better, the committee thought,

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[76]David M. Parry, "Annual Report of the President," NAM, *Eighth Convention* 67 (New Orleans, 1903).

[77]Wiebe states that the members of the NAM disliked the large combinations and lobbied for expanded antitrust prosecution around the turn of the century. Wiebe, *Businessmen and Reform* 14. If so, the members of the NAM apparently took Parry's advice and changed their tactics because little support for vigorous antitrust prosecution appeared in NAM literature after 1903.

[78]"Report of the Committee on National Incorporation," NAM, *Tenth Convention* 250-57 (Atlanta, 1905).

[79]"Report of the Committee on National Incorporation," NAM, *Eleventh Convention* (New York, 1906), 34-36.

would be a drive for uniform state laws.[80] So saying, the committee backed away from the issue.

The question proved to be difficult to dismiss, for in 1910 the Attorney General, George W. Wickersham, proposed a federal corporation bill that infatuated the committee. Eager to escape the vagaries of state laws, the committee gushed in favor of the bill: "We believe that the design and plan of a National Incorporating Act, wise in object, sane in terms, beneficent in purposes, will inure to the everlasting good will of our political and industrial body."[81]

Maybe, thought NAM president John Kirby, but maybe not.

> The idea of one incorporation law under which business can be conducted in all the States without reference to the annoying and hampering draw-backs of the various State laws appeals strongly to the average business man doing an interstate business, but let us be careful how we commit ourselves to the proposition lest, in view of the growing tendency toward federal control of corporations, "we jump from the frying pan into the fire." Popular clamor is for government control of corporations.
>
> The first national incorporation law may not be objectionable, but the thought to which we should give consideration is how long will it remain so?
>
> Let us not be in too great a hurry to commit ourselves to the scheme of national incorporation, but rather to take plenty of time to consider the question in all its phases and possibilities, as well as probabilities.[82]

If the NAM did not know exactly what it wanted, it knew precisely what it did not want. It did not want exemption from prosecution under the antitrust laws to be granted to organized labor. In 1906 the NAM resolved to "make demand upon the proper authorities to prosecute the officers and members of all combinations of capital and labor whenever their acts contravene the laws."[83] The NAM did not have so great an interest in moderation of antitrust prosecution as to make it willing to see the labor unions given greater latitude of operation. Again, the NAM was more concerned with holding the line against labor than with resolving the antitrust issue.

As mentioned earlier, it was over their attitudes concerning organized labor that the NAM and the Civic Federation most often quarreled. In 1908 the NAM opposed the Hepburn

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[80]"Report of the Committee on National Incorporation," NAM, *Fourteenth Convention* 178-80 (New York, 1909).

[81]"Report of the Committee on National Incorporation," NAM, *Fifteenth Convention* 252 (New York, 1910).

[82]John Kirby, Jr., "President's Annual Address," NAM, *Fifteenth Convention* 88-89 (New York, 1910).

[83]NAM, *Eleventh Convention* 148 (New York, 1906).

bill, which the Civic Federation supported, primarily because the bill exempted organized labor from antitrust prosecution.[84] In testimony before a subcommittee of the Senate Judiciary Committee, James A. Emery, general counsel for the NAM, agreed that the Sherman Act was difficult to interpret, but he objected to the Hepburn bill because of the distinction it made between profit and non-profit organizations—a distinction that would confer exemption on labor unions. He never explicitly stated that it was the labor exemption to which he was opposed, but the course of his testimony makes the reason for his opposition quite clear.[85]

In other instances the NAM showed a similar tendency to support extension of federal authority when it was clearly to the benefit of its members and to oppose all other efforts at reform or change, often with inconsistent and contradictory claims. For example, in 1908 Emery opposed federal child-labor legislation on the grounds that "[y]ou cannot concede a Federal control of production within each state as a means of obtaining an end, however laudable."[86] If the NAM had adhered rigidly to this principle, it could never have even considered the possibility of a federal incorporation law. Controlling the conditions of manufacture through the interstate commerce clause of the Constitution represented little more of an extension of the power of the federal government than did federal incorporation or license of interstate trade under the same clause.

Because the NAM was greatly interested in obtaining tariff revision and reciprocal agreements that would promote American overseas trade, the NAM did not hesitate to advocate continually the establishment of a semi-judicial tariff commission to advise Congress on revision of the tariff. The NAM apparently envisioned a commission with authority to implement its own suggestions. The report of the NAM's Committee on a Tariff Commission stated emphatically that it had "never favored a commission to simply investigate, gather cumulative data and make voluminous reports at the end of long interims."[87] Because there was little to lose and much to gain, the NAM had no objection to giving a government commission

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[84]Wiebe asserted that the NAM used the labor exemption simply as a rallying cry to appeal to other small business interests when the primary object was to prevent big business from obtaining the benefits of the bill. Wiebe, *Businessmen and Reform* 81. This assertion appears to be mistaken.

[85]*Amendments of the Sherman Antitrust Law: Hearings on S. 6331 and S. 6440 Before the Subcomm. of the Senate Comm. on the Judiciary*, 60th Cong. 77-82 (1908).

[86]James A. Emery, "Report of General Counsel," NAM, *Thirteenth Convention* 293 (New York, 1908).

[87]"Tariff Commission," NAM, *Sixteenth Convention* 225 (New York, 1911).

discretionary powers over the laws of international commerce. Nor was the NAM averse to the thought of having business patronized by the government, much after the fashion that George Perkins had been advocating. At the height of progressive enthusiasm, the presidential election year of 1912, the NAM Committee on Interstate Commerce and Federal Incorporation declared, "We do not believe that the state has nothing to do with industry and trade, but we do assert that the attitude of the government, towards business, generically speaking, should be sympathetic, co-operative, and elastic. We believe this to be a prime function of government."[88]

Yet when the Federal Trade Commission bill was in the making, the NAM was suspicious, hesitant, and fearful. The NAM Committee on Interstate Commerce and Federal Incorporation had very little to say in favor of any governmental action at all in 1914. The committee was frightened by the prospect of what might result.

> Whether or not the regulatory changes advocated by the present administration will meet the requirements of the problems involved, we cannot affirm. We have scant regard for that form of governmental regulation which does violence to the operation of natural laws of business, trade, and commerce. . . .
>
> We do not believe that there is a concentrated and serious demand, either on the part of the people generally or on the part of sound and unbiased thinkers, to change and modify the principles expressed in the Sherman Act. If there is not a demand for such changes it is folly for the administration to attempt to simulate or stimulate a demand. Moreover, present business conditions are such that tinkering with this famous instrument of trade would merely result in further stagnating our industrial activity and confusing our commercial progress. . . .
>
> To attempt, at this time, by legislative enactment, to enact further coercive regulation by experimental trust legislation would, in our opinion, be wholly unwise and fraught with grave economic and financial danger. We certainly view with extreme suspicion the perfection and virtue assigned to the Interstate Trades Commission. . . . We believe that the wisest, the best, and the most salutary thing the present administration can do is to demonstrate a spirit of cessation of this tendency towards confused, unnecessary and experimental legislation.[89]

The Committee urged a moratorium on antitrust legislation until the next Congress, pending return of better business conditions. Attempting to block further action on the antitrust

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[88]"Report of the Committee on Interstate Commerce and Federal Incorporation," NAM, *Seventeenth Convention* 29 (New York, 1912).

[89]"Report of the Committee on Interstate Commerce and Federal Incorporation," NAM, *Nineteenth Convention* 125-27 (New York, 1914).

bills, the NAM inaugurated an "Urge Congress to Adjourn" movement.[90] For the NAM there were no potential benefits to be had from modification of the antitrust laws that were worth risking the *status quo* to obtain. Federal incorporation had looked attractive to the NAM in the past because it offered relief from the confusion of conflicting state laws, but the NAM had felt that even so desirable a goal was not worth the risks involved in changing the law.

It is hardly surprising that the NAM balked at the Clayton and trade commission bills. Neither bill contained a solution to the problem of conflicting state laws or any other feature that would have appealed to the small and medium-sized manufacturers of the NAM. Increased rigor in the antitrust laws might impinge on the business activities, present or future, of the members of the NAM, while leniency would benefit primarily the rivals of the NAM, the magnates of the Civic Federation. The members of the NAM, despite a few minor complaints about the Sherman Act, thus had no interest in seeing major modifications made to the antitrust laws. On the contrary, it was against their interests to risk government intrusion on their independence by tampering with existing laws. Furthermore, the Clayton bill, if passed, would exempt labor unions from antitrust prosecution. The NAM had every reason to oppose the Clayton and trade commission bills.

If the policy of the National Civic Federation can be called progressive, and it clearly appears that it should, then the policy of the NAM must be called anti-progressive. The NAM was so adamantly opposed to reform that its reaction to progressivism bordered on hysteria. Progressivism clearly frightened many of the men in the NAM. NAM president John Kirby's annual address in 1912 was an impassioned outcry against the tremendous popular demand for reform. "For the first time in fifty years the organic basis of our commonwealth is challenged," he said. "It is not an issue—it is a crisis."[91] Asserting that both of the traditional political parties had failed to preserve the fundamentals of American society, he called for the emergence of a

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[90]Wiebe, "Business Disunity and the Progressive Movement," *supra* note 7, at 684. Wiebe suggests that the NAM opposed the FTC bill because of the advantages it might give big business. *See also* Wiebe, *Businessmen and Reform* 140. The report of the NAM Committee on Interstate Commerce and Federal Incorporation, which was written well before the trade commission bill had been strengthened by George Rublee's modifications, indicates that the NAM was motivated primarily by a fear of change of any sort and not by antagonism to big business.

[91]John Kirby, Jr., "President's Address," NAM, *Seventeenth Convention* 76 (New York, 1912).

third party to which "the great majority of those whose minds have temporarily wandered after false gods and glittering generalities" could rally in support of the Constitution.[92]

The third party emerged, but it was hardly what Kirby had called for. By 1914 the NAM would not countenance even the most moderate proposals for revision of the antitrust laws for fear that the door to regulation, once opened, would let in unimaginable horrors. The future of the progressive heritage looked dim indeed if such was the reaction of its heirs.

[92] *Id.* at 85.

DIVISION AMONG THE RANKS

The foregoing account suggests that big businessmen, who often resorted to monopolistic or semi-monopolistic practices, wanted trust reform that would legalize their combinations in restraint of trade while smaller businessmen, who did not resort to combinations in restraint of trade, did not want to upset the *status quo* for fear of something worse. Such a conclusion would be neat, simple, and very misleading. The magnates, at least the more vociferous and therefore the politically more important ones, were fairly uniform in their demand for antitrust reform that would legitimize their "cooperative" practices. In addition, because the NAM was the largest and most important organization of its kind and composition, at least a large portion of the manufacturers of moderate size in America were opposed to reform along the lines proposed by the magnates. In the latter case, however, "large portion" still left room for many manufacturers who did not agree with the stand taken by the NAM.

Some businessmen agreed with the NAM, but for reasons of their own. The American Antitrust League, which has left almost no historical vestiges but was apparently composed largely of businessmen, vigorously opposed any modification of the Sherman Act in 1908 and in 1912. In 1908 Henry B. Martin, the secretary of the Antitrust League, complained to a Senate committee that the National Civic Federation was lobbying to have dangerous combinations of capital exempted from the Sherman Act and that the Federation was receiving the cooperation of the administration in return for its assistance in nominating and electing the president. The committee professed shock.[93]

In 1912 Mr. Martin was back to assert that "[t]he offenses of corporations like the Standard Oil Co., the United States Steel Corporation, and the Tobacco Trust are so wide-spread that they are known to all men."[94] There is little indication of the motives behind the Antitrust League, except for a mention in Martin's testimony in 1908 of substantial representation from the Cattlemen's Association in the League. It is not difficult to imagine how cattlemen might be strongly antitrust in sentiment because they were vulnerable to exploitation by both the great

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[93] *Amendment of the Sherman Antitrust Law, Hearings on S. 6331 and S. 6440 Before the Subcomm. of the Senate Comm. on the Judiciary*, 60th Cong. 155-62 (1908).

[94] *Hearings Pursuant to Senate Resolution 98 Before the Senate Comm. on Interstate Commerce*, 62nd Cong., pt. 1, at 104 (1912).

railroad combinations and the so-called Beef Trust, which was eventually dissolved by court order. It might not be too great a conjecture to say that the Antitrust League represented a portion of the American business public that strongly favored vigorous antitrust prosecution as a result of personal grievances against one or more large combinations.

On the other hand, there were business organizations that were in full agreement with the programs of the Civic Federation, although these organizations do not appear to have represented interests of any greater magnitude than those typically found in the NAM. For instance, the Chicago Association of Commerce published its *Chicago Plan* in which it rejected "further detailed definition of 'restraint of trade' or unfair practices" and yet declared that "nothing hampers business like uncertainty." The solution to this dilemma, the Plan continued, would be the establishment of a trade commission that would "decide in advance as to the propriety, fairness and benefits of such proposed arrangements, each upon the merits of that particular case."[95]

Another voice from the Midwest concurred. In 1914 Mr. S.P. Bush of the Ohio Manufacturers' Association told the Senate Interstate Trade Committee that "[t]he feeling is very profound that a certain amount of cooperative effort is absolutely necessary, and to eliminate all cooperation and make it unlawful for competitors even to attempt any cooperative effort would be a grave mistake."[96] He felt that a trade commission that would apply the rule of reason as declared by the Supreme Court would solve the trust problem satisfactorily.[97]

These endorsements of a regulatory commission were not simply the symptoms of a generally progressive sentiment in the Midwest, for there were dissenters in the crowd. The Illinois Manufacturers' Association did not want a government commission of any kind prying into the files of its members.[98] A similar opinion was voiced by a group of small manufacturers in New York.[99] Yet there was another business organization in New York, the Merchant

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[95]Chicago Association of Commerce, *The Chicago Plan* (Chicago, 1914), as quoted in Wiebe, "Business Disunity and the Progressive Movement," *supra* note 7, at 683-84.

[96][This footnote is missing in the original paper. The most probable source of the quoted statement is *Hearings on Bills Relating to Trust Regulation Before the Senate Comm. on Interstate Commerce*, 63rd Cong., 2nd Sess. (1914).]

[97]*Id.* at 478.

[98]*Id.* at 466-77, *passim*.

[99]*Id.* at 209-36, *passim*. These seventy-five or eighty manufacturers, who were represented by their lawyer before the committee, had capitalizations of from $15,000 to $5,800,000. *Id.* at 209. They would have fitted well in

Association of New York, that tended to favor the regulated competition of the Civic Federation program.[100] Further evidence of the disorder in business opinion can be found in the results of a survey of business opinions conducted in 1911 by the National Civic Federation.[101] As in the testimony before the Congressional committees, opinion expressed in the Federation survey conformed neither to geography nor to size of interests.

Is there any way to explain the confusion of opinion? A little thought will suggest an answer. Although combinations in restraint of trade were and are often considered characteristic of big business, smaller businesses could also utilize the same collusive practices to increase their profits. There is abundant evidence that many small businessmen did indeed resort to such practices, especially when confronted with unfavorable business conditions. The instrument of collaboration was the trade association.

Trade associations differed from the organizations of general commerce such as the NAM in being organized along the lines of a particular industry or trade. In addition, the trade associations existed for the commercial benefit of their constituents, while the general commercial bodies were usually civic or service in nature and functioned primarily as forums for their members. To use the definition adopted by the American Trade Association Executives in 1922,

> A trade association is an organization of producers or distributors of a commodity or service upon a mutual basis for the purpose of promoting the business of their branch of industry and improving their service to the public through the compilation and distribution of information, the establishment of trade standards, and the cooperative handling of problems common to the production or distribution of the commodity or service with which they are concerned.[102]

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the NAM.

[100] *Hearings Pursuant to Senate Resolution 98 Before the Senate Comm. on Interstate Commerce*, 62nd Cong., pt. 1, at 525-27 (1912).

[101] National Civic Federation, *The Trust Problem: Replies of 16,000 Representative Americans to a Questionnaire* (New York, 1912).

[102] Hugh P. Baker, "Practical Problems of Trade Associations," XI *Proceedings of the Academy of Political Science* 629 (1924-1926).

One student of the association movement would add to the above definition that "[t]he trade association's primary object, whether expressed or not, is to so perfect the conduct of the trade or industry that the members of the association will themselves profit."[103]

Activities of trade associations varied with time and the judicial climate. The association movement had originated in the post-Civil War era, and before 1900 most associations had functioned simply as price pools aimed at keeping prices up. After the Sherman Act began to be enforced against overt price agreements, associations retained their interest in price-fixing but had to cloak it in the guise of legitimate activities.[104]

As in the case of the trusts and great industrial combinations, the trade associations were affected only gradually by the Sherman Act. It usually took the law considerable time to discover the motives that lay behind each new activity that the associations devised to camouflage their collusion. In 1899 the Supreme Court struck the first major blow at trade associations by declaring illegal an agreement of cast-iron pipe manufacturers to divide the market among themselves.[105] Ten years later the Supreme Court quashed another collaborative practice of the trade associations by refusing to enforce a contract whereby wallpaper manufacturers had agreed to market their products through a common selling agency.[106]

The rule of reason established by the *Standard Oil* and *American Tobacco* cases[107] offered a legal loophole for the activities of trade associations, but the respite proved more illusory than real. In 1914 the Supreme Court declared that the circulation among a group of retailers of a list naming wholesalers who sold directly to consumers at wholesale prices was an unreasonable restraint of trade because, despite protestations to the contrary, the list was in effect a boycott list.[108] The smaller manufacturers who had sought the benefits of collective action

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[103]George Roberts, "The Present Legal Status of Trade Associations and Their Problems," XI *Proceedings of the Academy of Political Science* 557 (1924-1926).

[104]Simon N. Whitney, *Trade Associations and Industrial Control* 40-41 (New York, 1934).

[105]*Addystone Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

[106]*Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909).

[107]*Standard Oil Co. v. United States*, 211 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 US. 106 (1911).

[108]*Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). The above summary is a paraphrase of Whitney, *Trade Associations* 50.

found themselves under attack. The Sherman Act, which had been adopted to suppress the trusts of the magnates, was being turned against the schemes of the little men.

The trade associations, however, proved themselves very ingenious and flexible. They would not be suppressed by a few unfavorable court decisions. If direct agreements to control prices, production, or distribution, whether maintained on a formal or a "friendly" basis, could be forbidden, there were other forms of collaboration that could be utilized with equally effective results. Detailed, periodic reports of the prices, production, and sales prevailing within an industry could easily have the effect of enabling individual companies to maintain uniform prices, to restrict production during times of slackened demand, and generally to stabilize profits at a fairly high level. The establishment of uniform cost accounting methods throughout an industry on the pretense of helping concerns to avoid unsuspected losses would usually have the effect of standardizing prices as individual companies began assigning, more or less arbitrarily, uniform costs to each step of production. But before any of these helpful practices could be implemented, the trade associations had to establish their legal right to exist in the face of growing public and judicial skepticism.

It took no great stretch of imagination on the part of trade associations to realize that the cooperative gospel preached by the magnates could also be profitably applied to their own enterprises. Indeed, one of the more important documents of the cooperative gospel was concerned primarily with small manufacturers and their trade associations rather than with the manufacturing empires of the magnates. This document, Arthur Jerome Eddy's *The New Competition*, proclaimed in authentic American revival style, "Competition is not worth preserving; like the familiar doctrine of the 'survival of the fittest' it is more than non-human; it is inhuman."[109] Eddy attacked traditional forms of competitive business as obsolete. There must be, he asserted, full access to information for all in the market in order for even the traditional theories of supply and demand to hold true. How could supply and demand work, he asked, if producers did not know the extent of the demand and buyers did not know the quantity of the supply? Eddy advocated abandonment of the old policies toward business combinations for a policy of allowing what he called "open price associations." These associations, which would be merely another variation of the trade associations, would supposedly rationalize

[109] Arthur Jerome Eddy, *The New Competition* 12 (Chicago, 1913).

competition by collecting and distributing, to producers and consumers alike, information on current prices and sales.[110]

Eddy's book gave the trade associations valuable support at the very time they were beginning to preach their cause in earnest. In the hearings on the Hepburn bill in 1908, the trade associations had little to say. A representative of the National Association of Retail Druggists had appeared to make sure that his organization would be included in the benefits of any bill that passed, but he had nothing constructive or new to offer.[111] By 1912, however, the trade associations were among the most vociferous and numerous interests before the congressional committees that were considering trust reform.

The coal industry was especially eager to have its case heard. In 1912 Mr. S.A. Taylor, president of the American Mining Congress and a representative of the Pittsburgh Coal Operators' Association, appeared before the Senate Committee on Interstate Commerce to urge modification of the Sherman Act to permit "reasonable" combination and the establishment of a commission to administer the law.[112] He claimed that the coal industry was experiencing hard times and was perhaps operating at a net loss of capital. He asserted that the application of proper cost accounting was needed to determine the exact financial position of the industry. He also asserted that the low prices being received for coal were causing great waste of coal deposits—from ten to fifty percent of the coal in a vein—because it was unprofitable to bring all the coal to the surface. It was in the national interest, he insisted, to allow combinations in the coal industry to raise prices and thus to prevent the great and irretrievable waste of coal resources.[113]

Mr. J.F. Callbreath, secretary of the American Mining Company, appeared before the same committee with the same sad tale to tell. He argued that conditions in the coal industry were ruinous and would lead to the growth of monopoly by attrition of the weaker companies that could not survive the poor times, leaving the industry to a few large producers. He alleged

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[110] *Id. passim*.

[111] *Amendment of the Sherman Antitrust Law: Hearings on S. 6331 and S. 6440 Before the Subcomm. on the Senate Comm. on the Judiciary*, 60th Cong. 75-76 (1908).

[112] *Hearings Pursuant to Senate Res. 98 Before the Senate Comm. on Interstate Commerce*, 62nd Cong., pt. 2, at 2382 (1912).

[113] *Id.* at 2380-84.

much production at a loss within the industry, although the tables that he presented, representing the costs and revenues of the Pittsburgh Coal Company for the past several years, indicated an average profit of about ten percent on sales for the period 1900-1910. Only higher prices or greater efficiency of operation could remedy the situation, he asserted, but neither could be obtained through open competition. He concluded that only widespread cooperation would save the industry.[114]

Two years later when the FTC bill was under consideration, the coal operators returned to press again for relief from the Sherman Act. Charles S. Keith, a coal operator from Kansas City, Missouri, and the president of the Southwestern Interstate Coal Operators' Association, testified in favor of a trade commission with administrative and judicial powers.

> We think if we come in good faith to this commission and submit our affairs to it, and ask it to guide us and tell us if we are doing something that is wrong, to put us right in the matter, that ought to be evidence of our good faith, and that should be amended by saying that if the recommended adjustment is not complied with within the time fixed by the commission, then a suit may be brought. . . .
>
> We believe that the time ought to come some time in our business relations where we can get to a point where we will understand and know just what we may and just what we may not do.[115]

Keith would have given the trade commission the power to restrict production to the level of consumption and to fix prices for the allowed production in industries which, like coal, had over-production problems.[116]

It is fairly clear from the testimony of the coal operators that their desire for revision of federal antitrust policy stemmed from a generally poor profit position within the industry. The coal industry was usually prosperous and expanding as a result of the increasing demand for fuel caused by the rapid expansion of American industry, but the coal industry was also given to fits of over-expansion.[117] Because business conditions in the United States were generally poor for several years after the Panic of 1907, it is quite possible that many coal operators might have

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[114] *Id.* at 2372-80.

[115] *Hearings on Interstate Trade Commission Before the House Comm. on Interstate and Foreign Commerce*, 63rd Cong., 2nd Sess. 428 (1914).

[116] *Id.* at 432.

[117] Waldo E. Fisher and Charles M. James, *Minimum Price Fixing in the Bituminous Coal Industry* 5-8 (Princeton, 1955).

found themselves temporarily in an unfavorable position during the years covered in the foregoing discussion. Price-fixing agreements and other forms of combination had been used in the coal industry in the past, so it is not surprising that coal producers should have thought to use collusive methods to remedy their problems.[118] Much of the tendency of businessmen to support lenient antitrust reform probably originated from declining financial status brought on by one or more external factors.

Even the retail merchants and tradesmen of America found refuge in the idea of cooperation through trade associations. It has often been assumed that the smallest businessmen were usually the most adamantly antitrust, but this assumption is only partially valid. The opinions of the merchants who were polled by the National Civic Federation in 1911 exhibited a revealing tendency toward strong polarization. The opinions of the manufacturers who were polled tended to favor moderate reform with few extreme positions in either direction being expressed, but the merchants were usually either strongly for or strongly against relaxation of the terms of the Sherman Act. Many merchants were unhesitatingly in favor of vigorous prosecution of the trusts, while others were eager to obtain legal license for the doctrines of cooperation. The split in opinion was similar to that found among small manufacturers, only more marked in the case of the merchants.[119]

The trust issue caused particular division and confusion among the ranks of the merchants. Often a group of men or members of an organization strongly desired to see the large business combinations prosecuted under the antitrust laws and yet at the same time desired to mitigate the stringency of the Sherman Act to avoid prosecution themselves. Usually they were forced to concede that they would never be able to obtain prosecution of big business solely on the grounds of being big, so they turned to pleading to be allowed to combine against their oppressors, using all sorts of excuses as justification for their demands.

For example, in December of 1911, the secretary of the National Federation of Retail Merchants, Mr. J.R. Moorehead, appeared before the Senate Interstate Commerce Committee on behalf of 212,000 merchants out of an estimated one million merchants in the country

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[118] *United States v. Coal Dealers Association*, 85 F. 252 (1898), resulted in the dissolution of a price-fixing agreement among wholesale coal dealers.

[119] National Civic Federation, *The Trust Problem*, *passim*.

(Moorehead's estimate).[120] His testimony was a bitter outcry against the mail-order houses that were apparently cutting significantly into the sales of small-town merchants. He complained that the propaganda campaign against the "middleman"—the retail merchant—might well fall within the bounds of the Sherman Act, but he then quickly disavowed any desire to legislate against "those who are surely working to the reduction of the little merchants."[121] He asked no favors for his organization but expressed extreme concern over reports that the secretaries of fourteen lumber associations had been indicted for activities in violation of the antitrust laws. Moorehead demanded that the antitrust laws be made clear so that trade associations would know where they stood in fighting competition.[122] Although he repeatedly denied any desire for legislative favors, it is obvious from his testimony that he was eager to see substantial freedom given to trade associations.

In 1914 Mr. Moorehead was back and made less effort to disguise his feelings. His testimony before the House Judiciary Committee, phrased as an address to President Wilson, was almost emotional in its joy over the protection Wilson had promised to the little man in *The New Freedom*. Moorehead vigorously defended the importance of the merchant, claiming that the merchant was the most important element in the structure of the rural small town, which, as everyone presumably knew, was the backbone of American society. Destruction of the merchants would result in complete urbanization of society as channels of distribution became concentrated in the large mercantile and mail-order concerns of the great cities. Moorehead pointed to the marked decline in population among rural small towns in recent years as evidence of the insidious effects of the mail-order houses. In order to arrest this subversion of American society, he pleaded, the "little business man" should be allowed to combine with his fellows against his larger competitors. He urged the amendment of the Sherman Act and the establishment of a trade commission to see that all business was conducted "open and above board."[123]

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[120] *Hearings Pursuant to Senate Resolution 98 Before the Senate Comm. on Interstate Commerce*, 62nd Cong., pt. 1, at 912-13 (1912).

[121] *Id.* at 918.

[122] *Id.*

[123] *Hearings on Trust Regulation Before the House Comm. on the Judiciary*, 63rd Cong., 2nd Sess. 133-39

It is not difficult to see that Moorehead wanted the trade commission to act as a patron of his association and others like it. As he explained before another congressional committee, if trade associations did not receive legal protection, the trade commission could perform the same function as the associations by publishing reports of the activities of the mail-order houses.[124] In other words, if the right of trades associations to circulate blacklists could not be established, Moorehead would have the government do the work for them.

Other groups appeared with similar tales of woe. The National Association of Retail Druggists, which had made a brief appearance in the hearings of 1908, sent its president to Washington in 1914 to complain that "[w]e are troubled very much by what we call unfair competition through a line of stores commonly called chain drug stores." He wanted the establishment of fixed retail prices by either private or public agency to prevent price undercutting, which he likened to rebates in the railroad industry.[125] The Secretary of the National Retail Grocers' Association, representing some 100,000 grocers and general merchandisers in over forty states, petitioned for a trade commission that would give relief from the law that prevented the dissemination of "information."[126] A representative of some thirty-five retail implement dealers in Wisconsin arrived to complain that the hardware and retail implement business was unprofitable enough without the competition of distributors who sold directly to consumers at wholesale prices. He implied that such direct selling should be considered illegal. He asked for no particular legislation, but he did have one very telling request: "We ask at your consideration, gentlemen, that in getting after the big business—which we are with you in every particular—do not kill the little business in doing so."[127]

Still others appeared. The president of the Nebraska Lumber Dealers' Association, representing about four hundred retail lumber dealers, lectured the House Judiciary Committee on the importance of lumber dealers to American society. "We come to you representing a group of men who we believe more frequently than any other are found to be leading aggressive

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(1914).

[124] *Hearings on Interstate Trade Commission Before the House Comm. on Interstate and Foreign Commerce*, 63rd Cong., 2nd Sess. 110-24 (1914).

[125] *Hearings on Trust Regulation Before the House Comm. on the Judiciary*, 63rd Cong., 2nd Sess. 167-68 (1914).

[126] *Id.* at 124-34.

[127] *Id.* at 166-67.

men of their community, contributing liberally to churches, charities, good roads, schools etc., and heavy payers of taxes, rent, and insurance."[128] The secretary of the association then took the stand to say that "[w]hat we want is to disseminate the information among our membership as to who are our competitors." When asked if the parties so named would not be those with whom they would not then deal, the secretary replied, "We naturally would not want to deal with them if they were competitors of ours."[129] The past president of the National Association of Plumbers was induced to make a similar confession. He, too, had a complaint against wholesalers and mail-order houses that were undercutting his business, and he was seeking redress in a trade commission that would arrest the growth of large combinations by publishing reports of their operations.[130]

Even the farmers had an association. Mr. T.J. Brooks, a farmer from Atwood, Tennessee, appeared before the Senate hearings in 1912 as a representative of the Farmers' Educational Association, "the largest organization of farmers in the world," encompassing about thirty states. He requested that farmers' marketing associations, the purpose of which was to obtain higher prices for farm produce by restricting distribution, be exempted from the antitrust laws. Without the aid of the associations, he asserted, farmers could not make a profit.[131]

It is apparent from the foregoing account that the businessmen of the country split into several factions over the trust issue. The captains of the largest concentrations of capital sought to protect their interests through the establishment of a flexible, more lenient policy of trust prosecution. They pioneered the field of business-government cooperation under the administration of Theodore Roosevelt and then led the country toward their vision of commercial utopia, regulation by a government trade commission. The moderately wealthy independent manufacturers tended to be frightened by demands for reforms of all sorts and would not support reform of the antitrust laws for fear of unexpected consequences even though they also had grievances against the antitrust laws. There were some among the ranks of these reluctant manufacturers, however, who were eager for change. They had learned the

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[128] *Id.* at 302.

[129] *Id.* at 305.

[130] *Id.* at 199-218; *Trade Commission Hearings* 134-37.

[131] *Hearings Pursuant to Senate Resolution 98 Before the Senate Comm. on Interstate Commerce*, 62nd Cong., pt.2, at 2336-46 (1912).

collaborative tricks of the magnates and were cooperating through their trade associations to increase their own prosperity. They tended to support the position of the magnates because the trust policy advocated by big business would give protection to trade association activities. Finally, there were many merchants who were eager to see the trusts or, for that matter, any large business broken up by the courts. Many of these same merchants had combined in trade associations in order to combat their larger competitors. Because only a policy of destroying all large corporations would help many of them and such a policy was very unlikely to be adopted, these merchants were anxious to have the Sherman Act modified so that their association activities would not fall under the condemnation of the law. Their position was highly ironic because the modifications that they sought were precisely those desired by the magnates, their commercial enemies.

With the basic interests involved in the question of revision of the antitrust laws determined, it seems only natural to inquire which interest or interests emerged from the progressive era the winner, if indeed there was any winner. The FTC bill that was eventually signed into law was potentially, although not necessarily, the law for which the magnates had been pressing. The community of magnates was in decline, however, and would soon vanish from public life entirely. Large corporations were passing into the hands of a middle-class industrial bureaucracy. Small businessmen were also rapidly losing their importance in society, but the industrialists of moderate means were growing in strength. There was, in short, a movement toward the middle, the middle that had been the one sector of the business community to harbor strong anti-progressive sentiments and a suspicious, fearful attitude toward the new antitrust laws. What happened when a government policy designed primarily by and for two very different classes of businessmen—the magnates and the merchants—was superimposed on a commercial community rapidly coming to be dominated by middle-sized businesses?

THE EARLY FTC: A FALTERING START

In early 1915 the businessmen of the country looked with anxious anticipation toward the newly created Federal Trade Commission to see if any indications of future policy could be discerned. The young and thriving Chamber of Commerce of the United States eagerly established a committee to consult with the FTC and to render such advice and assistance as the Commission might request. The Chamber did not want to miss any possible chance of promoting friendly relations between the judge and the judged. The NAM was also intensely interested but a bit more skeptical. It, too, appointed a committee to follow and report on the activities of the FTC, but the NAM did not plan direct cooperation with the Commission. George Pope, the president of the NAM, was cautiously guarded in his judgment of the new agency.

> It is not clear to us to what extent the Commission will exercise supervision in and about business conduct. Let us express the hope that it will never become meddlesome for business is very sensitive and it requires no skill whatever to frighten capital or disturb the force of creative enterprise.[132]

He hoped that the FTC would move very cautiously and exercise "zealous care" so as not to disturb the ninety-nine percent of business that was honest.[133] The general counsel for the NAM, James A. Emery, belittled the idea of a regulatory commission in an address in which he gave his professional interpretation of the FTC Act, but he grudgingly admitted that there were signs that indicated a loosening of restrictions on business.[134]

The FTC, for its part, commenced it activities slowly and with caution, almost too much so. Many questions about the operation of the Commission pressed for solution from the beginning of its existence, but the answers were slow in coming. The most important question was whether the Commission would undertake to advise business in advance on the legality of proposed business plans. More astute observers such as James Emery realized that the Commission had no legal authority to give advice, and the Commission early announced that it

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[132]George Pope, "President's Message," NAM, *Twentieth Convention* 14-15 (New York, 1915).

[133]*Id.* at 14.

[134]James A. Emery, "Federal Trade Commission," NAM, *Twentieth Convention* 171-72 (New York, 1915).

would not attempt advisory work.[135] Yet businessmen persisted in submitting requests for advice to the Commission. George Rublee, an original member of the Commission, reported about ten years later that there had been much discussion and disagreement within the Commission on the subject and that no set policy was established while he was still a member.[136]

There seems to have been rather much disagreement among the commissioners. In fact, the Commission appears to have been crippled in its early years by a lack of coherent policy and an absence of coordination among its members. Nelson Gaskill, who joined the Commission in 1920, claimed that during the entire course of his five years with the Commission he could discover no evidence of "even the beginnings of a definite policy or the shadow of an established meaning of the constituent act or set purpose to outline a specific field of jurisdiction."[137] Not only were the members of the Commission unable to decide among themselves just what the function and scope of the Commission should be, but there also appears to have been a paucity of guidance offered from the Wilson administration. After assuring businessmen that he did not consider bigness in business bad and that he hoped businessmen would avail themselves of the helpful services of the FTC, Wilson apparently left the Commission to its own devices.[138] The problems of waging war and securing peace kept him too busy to give much thought to the Commission. The Attorney General, Thomas W. Gregory, also offered little guidance. He stated that he did not plan to consult with the FTC as to whether the law had been violated in a particular case but that he would solicit its advice in formulating settlements of difficult cases, as he was empowered by law to do. He made no further comment on the operation or potential effect of the FTC.[139]

Whatever the reason, the Commission failed to establish either a coherent policy or a definite position for itself within the hierarchy of the judicial process. During the war the

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[135] *Id.* at 165; "The New Umpires of Business," III *The Nation's Business* 7 (April, 1915).

[136] George Rublee, "The Original Plan and Early History of the Federal Trade Commission," XI *Proceedings of the Academy of Political Science* 671 (1924-1926).

[137] Nelson B. Gaskill, *The Regulation of Competition* 66 (New York, 1936).

[138] "New Umpires of American Business," *supra* note 135; Woodrow Wilson, "The President's Message to Business Men," an address delivered at the Fourth Annual Meeting of the Chamber of Commerce of the U.S., IV *The Nation's Business* 19 (February, 1916).

[139] "The Government and the Sherman Law," IV *The Nation's Business* 7 (January, 1916).

Commission did demonstrate its usefulness as an investigative body, undertaking important cost studies and other administrative tasks for several agencies at the direction of the president.[140] Only in investigating a number of stock frauds, however, did the Commission exercise its regulatory power.

What little the FTC did accomplish as a regulatory agency was apparently not managed well. The Commission began its career with an effort to orient itself to the conditions existing in the business world by sending out questionnaires. The vast majority of the businessmen polled responded with a cooperative attitude.[141] It was not long, however, before this congenial rapport was shattered. Sometime during late 1917 or early 1918, the Chamber of Commerce Committee on the FTC prepared a formal complaint in which it accused the Commission of a number of mistakes and abuses. The major complaint was that the FTC had conducted itself as a public prosecutor instead of as a guide and counselor to the business world. According to the Chamber committee, the Commission had also undertaken the exercise of functions beyond its authority, making itself an arbiter and director of business operations in several instances. The Commission misused its publicity powers, the committee further asserted, by giving notification of the issuance of a complaint to the news media before the accused company had a chance to defend itself from the unfavorable charge. Even worse, the committee complained, the FTC had failed to establish the necessary continuity of policy and personnel, two members having left to seek public office in the short existence of the Commission.[142]

The FTC apparently did not attempt to answer the charges of the Chamber committee directly but instead alleged that the Chamber was trying to help certain members of the packing industry who were then undergoing investigation by the government. The Chamber was called before the Senate Committee on Agriculture to disclose the amount of support that it received from the packing industry. When the Chamber demonstrated that the amount of such support was only a small part of its total revenue, the investigation was dropped.[143] Angered, the

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[140]Henry Miller, *World War Activities of the Federal Trade Commission, 1917-1918* (Washington, 1940).

[141]"New Umpires of American Business," *supra* note 135.

[142]Chamber of Commerce of the U.S., "Board of Directors' Annual Report: Controversy With the Federal Trade Commission," *Seventh Annual Meeting* 1-33 (1918); "The Case of the Federal Trade Commission," IV *The Nation's Business* 9-11, 36 (October, 1918).

[143]"Board of Directors' Annual Report: Controversy With the Federal Trade Commission," *supra* note

Chamber accused the Commission of staging a "roorback"—a defamatory falsehood published for political effect.[144] It is unclear whether the Chamber ever received a satisfactory explanation from the Commission, but by the end of the year the dispute had been patched up. In December of 1918, *The Nation's Business*, the official organ of the Chamber, published an article in which personal sketches of the members of the FTC were presented in a friendly, informal manner. Bare mention was made of the dispute, and no discussion of Commission policy was undertaken.[145]

The Chamber of Commerce was reconciled with the Commission, but elsewhere in the business world displeasure was longer lived. In May of 1919, NAM general counsel James Emery implied in an address before the annual convention of the NAM that the personnel of the FTC were inexperienced and incompetent. He asserted that business should accept the responsibility of providing qualified men to serve on the Commission. In other words, he felt that the responsibility for regulating business should belong to business itself.[146]

The FTC was apparently somewhat concerned by its poor relations with the business community, for shortly after the dispute with the Chamber of Commerce, the Commission instituted a practice that was expected to be of significant assistance to business. This new procedure, which was called the trade practice submittal, was adopted in response to complaints from certain industries that they were plagued by unfair practices they were powerless to eradicate unaided.

The complaints arose because a few companies within an industry would employ unfair and fraudulent practices, such as the use of misleading advertising or nomenclature or the production of sub-standard merchandise, and the rest of the industry would have no effective defense for the harm done to them by the use of such practices. Industries so plagued began requesting the FTC to assist them in drawing up codes of industry conduct that would abolish

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[144]"Horn-Swoggling the Business Man," VI *Nation's Business* 12 (November, 1918); *Webster's Unabridged Dictionary*.

[145]James B. Morrow, "The Federal Trade Triumvirate," VI *The Nation's Business* 14-16 (December, 1918).

[146]James A. Emery, "Full Steam Ahead for Industry," NAM, *Twenty-Fourth Convention* 337 (New York, 1919).

the unfair practices.[147] The first trade practice submittal, held in November of 1918, dealt with manufacturers of gold-plated finger rings who wanted to establish standards for their industry. Honest manufacturers of rings were often driven by competition to reduce continually the content of the gold in their rings with the result that the public, who could never tell exactly how well a ring had been plated, were sold rings of rather poor quality. As an aggravation of the problem, dishonest men occasionally defrauded the public with shoddy merchandise, damaging the reputation of the entire industry. The FTC solved the problem by prescribing nomenclature and standards for plated rings.[148]

The trade practice submittal became popular with business and was used with moderate success for the next few years. The effectiveness of the submittal might have been much greater than it was if the Supreme Court had not severely restricted the power of the FTC to interpret the Sherman Act and to define the term "unfair methods of competition," which was found in the FTC Act. In the *Gratz* case, which was decided in 1920, the Supreme Court declared, "The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as a matter of law, what they include."[149] The Supreme Court held, in effect, that the FTC was not a regulatory commission at all, but only an investigating and prosecuting agency. The Commission had no authority to decide what practices were and were not, in the context of their particular industries, unfair methods of competition and therefore illegal. The FTC could be of no assistance to industries that desired to establish and enforce specialized codes of ethics that were not already enforceable under the law.

The Supreme Court flatly rejected the request often made by business, sometimes with legitimate reason and sometimes with the intent of furthering collusion, that business practices be judged not simply by reference to a rigid legal standard but also in the context of their particular industries and in light of their effect on the public interest. The court stated that only free and unrestricted competition was in the public interest. No restrictions by magnates, trade associations, or anyone else would be allowed for any reason, no matter how plausible.

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[147] Federal Trade Commission, *Trade Practice Submittals* 1 (Washington, 1925).

[148] *Id.* at 4-5.

[149] *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-28 (1920).

Henceforth, the FTC had to restrict itself to endorsing only those trade practice submittals it felt that it could enforce under the body of existing judicial precedent.[150] The Sherman Act was still the great standard of antitrust law. The FTC Act and the Clayton Act had changed practically nothing.

Businessmen had apparently gained no benefit from the Commission even though virtually everyone, including the president, said that it had been established to assist them. The FTC was little more than a government agency specializing in investigating and prosecuting business. There was, however, one indirect benefit to businessmen. During the period of intense interest in and discussion of the antitrust laws, businessmen had learned to organize in order to exert their collective opinion. Not just the few who had been vocal in the congressional hearings, but all businessmen began to realize the necessity of political action to protect their interests.

The establishment of the United States Chamber of Commerce in 1912 was indicative of the growing awareness of businessmen of the need for effective collective expression. In 1916 the president of the U.S. Chamber declared that the first purpose of the organization was "the concentration of the business opinion of this country in important national problems." Other major purposes of the Chamber were the extension of business cooperation with the government and assistance to the members in their commercial lives.[151] The establishment of the U.S. Chamber also marked the emergence of the small and moderate-scale businessmen of the South, West, and Midwest as a nationally important political force, for the Chamber relied heavily on these groups for its support.[152]

One of the driving forces behind the movement for coordination among businessmen appears to have come from the NAM. As early as 1911 the NAM had become aware of the need, for in that year President John Kirby, Jr. told the annual convention,

> We are living in an age of organization; an age when but little can be accomplished except through organization; an age when organization must cope with organization; an age when organization alone can preserve your industrial

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[150]Gaskill, *Regulation of Competition* 108-11.

[151]John H. Fahey, "The U.S. Chamber, Democracy in Business," an address before the Fourth Annual Meeting of the Chamber of Commerce of the U.S., IV *The Nation's Business* 13 (February, 1916).

[152]Robert H. Wiebe, *Businessmen and Reform: A Study of the Progressive Movement* 154 (Cambridge, 1962).

> freedom and mine; and the sooner all business men learn the lesson that the preservation of their industrial and commercial rights is dependent upon organization the sooner will those rights, which are now hanging in the balance, be assured to them.[153]

Consistent with this attitude, the NAM heartily supported the organization of the U.S. Chamber of Commerce.[154]

After the Clayton and the FTC Acts had been passed and the NAM was left, so to speak, crying in the wilderness, the NAM became even more conscious of the need to mobilize business opinion. In February of 1916, the NAM launched the National Industrial Conservation Movement, which was a massive propaganda campaign aimed at convincing labor and the general public that their best interests lay in protecting industry and fostering its unrestricted development.[155] A large portion of the convention for that year was devoted to discussing the need for organization and coordination among businessmen.

The founding in 1916 of the National Industrial Conference Board, which was intended to coordinate the efforts of about fifteen different industrial organizations including the NAM, marked the culmination of the drive for better organization of business. It also marked a *rapprochement* between the swelling ranks of the medium-sized industrialists of the NAM and the dwindling numbers of magnates in the National Civic Federation.[156] The Conference Board was to be "an investigative, deliberative and advisory body."[157] Its intended functions bore a close resemblance to some of the services that many businessmen had hoped to obtain from a government trade commission. Business was beginning to realize that it was going to have to fend for itself and to protect its own interests. Businessmen in general, but especially those in the growing middle ranks, were acutely aware of the need to be able to articulate their interests publicly. They had already been caught unawares once, and that was once too much. Henceforth, they would be prepared.

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[153]John Kirby, Jr., "President's Address," NAM, *Sixteenth Convention* 66 (New York, 1911).

[154]George S. Boudinot, "Secretary's Report," NAM, *Seventeenth Convention* 66 (New York, 1912).

[155]George Pope, "Annual Address of the President," NAM, *Twenty-Second Convention* 111-12 (New York, 1917).

[156]Wiebe, *Business and Reform* 32.

[157]Pope, "Annual Address," *supra* note 155, at 114.

THE WAR

The experience of the Great War was far more important than either the FTC Act or the Clayton Act in its immediate effect on business. During the war the economy was rapidly transformed from a free-enterprise system based on supply and demand to a system directed and controlled from Washington. The philosophy of government regulation was carried to its extreme limit. Early in the war, the Army Appropriation Act of August 29, 1916, created the Council of National Defense, which was to have advisory powers to coordinate the resources and industries of the nation for the protection of national security. As soon as buying for America's effort in the war began in 1917, serious shortages in goods and material developed or threatened, partially because of the heavy demand already being made by the Allied countries. In an attempt to meet the need for better coordination, the War Industries Board was established in July of 1917. The strain of the work wore out two chairmen in rapid succession, leaving the economy of the country in disorder. During March of 1918, President Wilson utilized the sweeping powers conferred upon him by the Overman Act to re-organize the War Industries Board under the direction of Bernard M. Baruch and to give it practically dictatorial control over the whole of American industry. Baruch gathered about himself businessmen from all industries to help coordinate the war effort through controls over prices, government buying, and the supply of resources of all kinds.[158]

Because the demands of war were absolute and had to be met regardless of cost, prices had risen to dizzying levels in critical markets as demand far outran supply. Wildly fluctuating prices, shortages of raw materials, and delivery problems had crippled the war machine of American industry when Baruch assumed his task. The War Industries Board undertook immediately to establish order and to assure the best possible use of all resources. The method used was fixing of prices, especially on raw materials. Because the price mechanism by which goods and resources are normally distributed was made inoperative, some substitute rationing standard had to be established. The rationing mechanism used was the priority system. Companies were required to apply for priority permits for every important resource that they wished to use, even such things as railroad transportation and electric power being rationed under the priority system. The priority system guaranteed that the most pressing war and

[158]Bernard M. Baruch, *American Industry in the War* 15-29 (New York, 1941).

civilian needs were satisfied before the production of goods and services of lesser importance was commenced.[159]

In order to obtain the absolute maximum possible utilization of the resources of the country in the war effort, the Board launched a radical assault on all kinds of waste within the economy. What was accomplished is best demonstrated by specific examples. To conserve wheat and the labor of bakers, the practice of allowing retailers to return unsold bread to the baker, who normally discarded it, was abolished. Merchants offering delivery service were requested to restrict their deliveries to once a day in order to conserve horses, vehicles, and the labor of the drivers. Traveling salesmen were induced to reduce the number of sample trunks that they carried in order to conserve valuable shipping capacity of the railroads. Women's fashions were re-designed to conserve cloth. Varieties of all sorts of products underwent a drastic reduction. Vital materials were conserved either by substitution of other materials for some uses or by restriction of production of articles requiring the use of the materials. The conservation program was both ingenious in conception and sweeping in application.[160]

The War Industries Board had to undertake administrative work in yet another field, that of labor relations. The demands of war had created disorder in the labor market similar to that in the materials, power, and service markets. Throughout the war, high rates of turnover in war industries caused by competitive bidding among producers for labor resulted in many serious delays in vital production. There were also many disputes between labor and management over working conditions that had to be mediated. In addition, certain groups such as the I.W.W. stirred up labor unrest and further complicated the problems of production.[161]

All the undertakings of the War Industries Board required the full cooperation of industry to be successful. Because prices were fixed on a cost-plus-reasonable-profit basis, the Board had to know what the costs prevailing in an industry were. Surveys of costs had to be conducted and hearings with representatives of industry held before each price schedule was announced. Surveys of facilities existing in industry had to be made in order to determine which industries could best adapt to the production of war supplies. Business cooperated in this work

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[159] *Id.* at 47-61, 73-85.

[160] *Id.* at 62-72.

[161] *Id.* at 86-96.

by answering questionnaires sent out by the Board. Industries themselves had to carry on most of the work of the conservation program. The close cooperation of management was required for the successful mediation of labor problems. Each of these activities necessitated authoritative representation of each industry before the War Board, for it was plainly impossible for the Board to consult individually with every member of an industry.

The problem found solution in the creation of war service committees appointed by each industry to represent it before the various divisions of the Board. Often these representative committees were appointed by pre-existing trade associations. Industries that were not so organized were urged to organize as quickly as possible. Business responded willingly. The U.S. Chamber of Commerce took particular interest in the formation of the war service committees. The Chamber opened its convention in September of 1917 to non-members in order to gather as representative a cross-section of the businessmen of the nation as possible. The convention passed a resolution urging all industries to organize in war service committees to aid the government and to protect their own interests.[162] In February of 1918, the Chamber published a pamphlet extolling the advantages of forming war service committees.[163] These organizational efforts led to a marked increase in the number of trade associations active within the country. The National Industrial Conference Board also played a part in representing business before the government. It appointed five businessmen to sit on the committee that was the forerunner of the National War Labor Board.

The various implications of organization did not escape the business community. At about the same time the Chamber launched its drive for organization of all industry, *Nation's Business* published an article by R. Goodwyn Rhett, president of the Chamber, examining the legality of trade associations. Rhett surmised that there seemed to be a movement within the government toward a more flexible common-law interpretation of the Sherman Act. He concluded that the war service committees could not in any case be considered illegal because they had been called into being by the government; that is, they were functioning in the public

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[162]R. Goodwyn Rhett, "Organize for the War and the Afterwar!," VI *The Nation's Business* 27 (February, 1918).

[163]"Advantages of War Service Committees," printed in Baruch, *American Industry* 306-08.

interest.[164] Six months later the new president of the Chamber, Harry A. Wheeler, predicted a rosy future for business as a result of the war experience.

> Organization for war service is giving business the foundation for the kind of cooperative effort that alone can make the United States economically efficient enough to take its place with the nations in world trade. . . . Creation of war service committees promises to furnish the basis for a truly national organization of industry whose proportions and opportunities are unlimited. . . . The integration of business, the expressed aim of the U.S. Chamber, is in sight.[165]

The NAM was similarly enthusiastic over the prospects for business in the post-war era. "We do not believe that there will be a return of pre-war conditions," the NAM Committee on Interstate Commerce and Federal Incorporation reported, "for we hold that the efficiency of a larger degree of national administration will justify itself in post bellum conditions. . . . There will be a new spirit of enterprise and permissive legislation which will stimulate our industrial growth along marvelous lines of prosperity."[166] James A. Emery, general counsel of the NAM, concurred. He felt that a change in the attitude of businessmen toward the government had occurred and that businessmen were now more willing to cooperate with the government.[167] Before it adjourned, the convention that had heard these hopeful pronouncements passed a resolution declaring that the Sherman Act and the Clayton Act were a detriment to the economy and should be investigated by Congress for the purpose of revising them to suit conditions of the times.[168]

The following year the NAM reiterated its desire for more lenient regulation, emphasizing that wartime regulations must be removed and that business should be allowed to function unfettered. President Stephen C. Mason said,

> I doubt the wisdom of creating more permanent boards and commissions to have administrative control over the conduct and transaction of business. I think manufacturers can take care of their own problems themselves, if they may

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[164]Rhett, "Organize for the War," *supra* note 162, at 26-27.

[165]Harry A. Wheeler, in an article in VI *The Nation's Business* (August, 1918), as quoted in Baruch, *American Industry* 23.

[166]"Report of the Committee on Interstate Commerce and Federal Incorporation," NAM, *Twenty-Third Convention* 60 (New York, 1913).

[167]James A. Emery, "War—The Test of Democracy," NAM, *Twenty-Third Convention* 297-98 (New York, 1913).

[168]"Sherman-Clayton Acts," NAM, *Twenty-Third Convention* 107 (New York, 1918).

> be allowed to do so, in a much more efficient and satisfactory manner than any paternalistic government board can do it. All business wants or needs is a fair chance to deal with its own problems.[169]

True to its traditions, the NAM did not want the government directing business, especially after the FTC had failed to be as beneficial as predicted.

James Emery articulated the aims of the NAM with more precision.

> We are presented today with the great spectacle of a necessity for combined effort. This is a world of combined effort. . . . The limits within which combination can be permitted are those limits within which it is demonstrated that they operate to the betterment of public interest. . . .
>
> We need something more than the mere clarification of the Sherman Act. We need an understanding of the right economic theory for combination.[170]

J.P Morgan partner George Perkins had said about the same thing nearly ten years earlier, but his words had been met with a very cool reception from the NAM.

In 1919, however, times and the ideas of the NAM had definitely changed. Perkins' reincarnated words were met with a warm reception and an affirmative resolution that declared, "It is not the fact but the effect of combinations upon the public interest that should be the determining factor in permitting or prohibiting it and it is socially beneficial to permit and encourage every form of cooperative effort that is not adverse to the public interest . . . ."[171]

Something had happened—apparently during the war—that caused the NAM to alter its economic theories drastically. Until about 1917 the NAM had preached a *laissez-faire* philosophy of government regulation. The NAM had not disputed the right of the government to prevent monopoly and other blatant abuses of commercial rights; it had even looked with equanimity on a moderate antitrust policy because such a policy rarely disturbed its members but did serve to harass labor and the tycoons, neither of whom the NAM particularly liked. Some police action was accepted as inevitable, in any case. The prospect of expanded government control of business, on the other hand, had frightened and angered the NAM. Unlike the Civic Federation, the NAM had no interest in exchanging independence for privileges. The NAM would have willingly lived with the Sherman Act for the sake of avoiding increased government

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[169]Stephen C. Mason, "Annual Address of the President," NAM, *Twenty-Fourth Convention* 152 (New York, 1919).

[170]James A. Emery, "Full Steam Ahead for Industry," NAM, *Twenty-Fourth Convention* 334-35 (New York, 1919).

[171]"Trade Combinations," NAM, *Twenty-Fourth Convention* 285 (New York, 1919).

interference in its affairs. The NAM asked nothing from the government so much as to be left alone.

Yet suddenly the NAM began to see merit in what the now nearly defunct Civic Federation had been saying. Combination that was "in the public interest" began to sound very reasonable and very attractive to the NAM. The U.S. Chamber of Commerce was similarly enthusiastic over a moderation of antitrust prosecution that it believed it saw in the policy of the administration. The newly arrived community of medium-sized businesses had experienced something during the Great War that made it very eager to resurrect some of the ideas of the community of magnates it had displaced. Just what was it in the experience of the war that had so persuasive an influence?

There were several war-time practices that held a particular fascination for businessmen even well after the conflict was over. One of these practices was the elimination of waste in industry. Businessmen had no desire to return to the pre-war proliferation of endless varieties of products because to do so would prevent the utilization of the rapidly improving techniques of mass production. The war had so clearly demonstrated the desirability of standardization, many believed, that no one could possibly object if businessmen were to combine in the post-war era to preserve and extend the benefits already procured. As one author put it, "War is the acid test. From a bath of real war few economic follies can survive unquestioned. Combination in restraint of other people's trade is illegal; but other combinations are left open to industry, such for example, as combinations in restraint of waste."[172]

Those who asserted that combinations to restrict waste would be in the public interest had a fairly good case. The consumer might suffer if an industry decided to standardize on a single, highly priced product in place of a moderate variety of qualities and prices, but the consumer stood to gain in many more ways. For instance, one of the primary benefits of mass production of limited varieties would be lower prices for the consumer. Also, standardization of grades and nomenclature within many industries would enable the consumer to shop more selectively without having to become an expert on the products of each producer.

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[172]Donald Wilheim, "Combinations in Restraint of Waste," VI *The Nation's Business* 12 (October, 1918). *See also* Thomas H. Uzzell, "An Idea That Won't Demobilize," VII *The Nation's Business* 16-18 (September, 1919).

The benefits of another form of war-time standardization in which business was intensely interested, uniform cost accounting, were not weighted so heavily in favor of the consumer. As previously mentioned, the use of uniform cost accounting within an industry often became a means by which manufacturers standardized their prices, thus achieving indirectly a form of standardization that no one attempted to defend openly. Uniform cost accounting itself was not particularly easy to defend. It had been employed during the war primarily because the government had been forced to decide what was a fair price to pay for the items it purchased. The costs of each individual defense contractor could not be assessed, so it was necessary to conduct cost surveys within defense industries and to employ uniform cost accounting in the process in order to determine a fair price, based on costs, for each item purchased. In peacetime under the free-market system of exchange, uniform cost accounting was really not needed. Defenses of the practice were offered, but they were generally awkward and unconvincing.

The approach employed by one individual who did attempt to defend uniform cost accounting was reminiscent of Arthur Jerome Eddy's arguments. "It is obvious," he asserted, "that uniformity in the method of arriving at cost . . . would undoubtably result in better competition, because each manufacturer will at all times know that each and every competitor will be figuring his costs on the same basis . . . ."[173] And, one might add, figuring to charge the same prices.

It is hardly an accident that the protagonist of the foregoing argument chose to employ the reasoning of Arthur Jerome Eddy, the ardent

champion of trade associations, for the protagonist was himself a trade association officer. The trade associations were trying, it seems, to wring every possible benefit from the approval and encouragement they had received during the war. The necessities of the war had made many practices that would not have been tolerated in normal times acceptable and even socially desirable. The trade associations tried to continue these activities after the conditions that had fostered them were gone. The associations played heavily on their record of service to the

[173]Roland H. Zinn, "The Necessity of Knowing Manufacturing Costs," XX *American Industries* 21 (September, 1919).

government during the war to convince the public that they were truly desirable economic organizations, even in time of peace. They were at least partially successful.

In many respects the philosophies of the trade associations were typical of business opinion in general in the post-war years. As previously discussed, both the NAM and the U.S. Chamber of Commerce were excited over the prospect of more lenient attitudes toward combination on the part of the government. So neatly did the ideas expressed in the literature of these two organizations mesh with the interests of the trade associations that it seems impossible to escape the conclusion that a large portion of the businessmen of the nation had become involved in collusive trade association activities. Before the war, defenses of the right to combine in restraint of competition had originated almost exclusively with the magnates and with trade associations representing interests that were under severe competitive pressures. Both groups had obvious reasons for wanting license to combine. After the war it seems that the whole of the business community desired similar license. The war had left very few industries unorganized in associations or uninitiated to the benefits, both legitimate and illegitimate, that could be had from cooperation and combination.

The trade association as a means of collaboration was ideally suited to the needs of small and medium-sized businesses because it gave them the strengths and advantages of the giant corporations without the sacrifice of individuality that would have resulted from merging with competitors. Furthermore, unlike the trusts and giant corporations of the magnates, trade associations still had considerable respectability. Through the medium of trade associations, small and middle-sized businesses could indulge in practices that were forbidden to the magnates. The newly arisen community of independent industrialists did not ignore the opportunity presented by trade associations. What had been an isolated disease in the past became an epidemic.

THE DEPARTMENT OF COMMERCE

Businessmen were far from unsuccessful in their efforts to obtain ideological allies for their collective activities. Their principal patron was none other than an agency of the federal government, the Department of Commerce. The patronizing policy that the Department of Commerce followed during the 1920's apparently had immediate roots in the conciliatory attitude toward business that President Wilson adopted in his campaign for re-election in 1916. In that year the Secretary of Commerce, William C. Redfield, began assuring businessmen of his desire to assist them, urging them to make use of the services offered by the Department.[174] During the war he maintained this position, continually urging business to cooperate with the government and to utilize the services of the Department.[175]

In the period after the war when there was some concern among businessmen that the government might continue its close control of business on a peace-time basis, Redfield again offered assurance that he desired only to help and that he had no intention of exercising regulatory control of any sort.[176] He became a leading advocate of friendly cooperation between business and the government. In 1919 Redfield made the following statement:

> The first thing that should exist between the Government and manufacturers and industries, at least so far as the Department of Commerce is concerned, is absolute openness and confidence. There should be nothing in the operation of the commercial department of the Government that is not freely at the disposal of every manufacturer in the country who desires it, and there should be quite equal frankness on the part of the manufacturers and of commerce toward the Department of Commerce.[177]

With the presidential elections of 1920 drawing closer, Redfield to began to champion the cause of cooperation among businessmen, and he endorsed modification of the Sherman Act to make greater cooperation possible. He stated that business morals had improved so much that

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[174]"Waste: A Little Fox that Destroys the Vines," an authorized interview with William C. Redfield, Secretary of Commerce, IV *The Nation's Business* 1-3 (August, 1916); William C. Redfield, "Department of Commerce and Commercial Statistics," remarks before the Fourth Annual Meeting of the Chamber of Commerce of the U.S., IV *The Nation's Business* 79-80 (February, 1916).

[175]William C. Redfield, "How Manufacturers Can Help," NAM, *Twenty-Second Convention* 224-25 (New York, 1917).

[176]William C. Redfield, "Relation of Government to Business," NAM, *Twenty-Fourth Convention* 299-324 (New York, 1919).

[177]William C. Redfield, "Relation of Government Toward Manufacture and Industry," XIX *American Industries* 28 (June, 1919).

the antitrust laws were no longer appropriate for prevailing conditions. Defending the assertion that cooperation was economically and socially desirable, he declared, "In its essential character competition is non-human and is cruel." Ruthless competition destroyed all but the very strongest and led to monopoly, he continued. The proper solution, Redfield asserted, was a compromise of cooperation, keeping the responsibilities of business toward the public, labor, and owners simultaneously in mind.[178]

Herbert Hoover, who became Secretary of Commerce in 1921 after the Republican presidential victory, embraced Redfield's policy. Like Redfield, Hoover assured business that he intended only to help and that he had no intention of exercising regulatory powers over commerce.

> There is no regulatory function in the Department of Commerce, . . . and it is my feeling that in order that this Department shall be of the greatest service to commerce and industry, it should be maintained on a non-regulatory basis, that its whole relationship should be one of cooperation with our business public . . . .[179]

Hoover had hardly assumed office when he began making efforts to assist business, addressing himself to the problem of waste in industry. He declared that increased cooperation among businessmen with the aid of the government offered the best solution for most business problems. "The spirit of cooperation that has been growing in our country during the last thirty years has already solved many things; it . . . is ripe for initiative toward cooperation of a widespread character. The leadership of our Federal Government in bringing together the forces is needed."[180] Morgan partner George Perkins would have been highly pleased, but George Perkins was dead.

In his actions Hoover was true to his words. One of his most important contributions as Secretary of Commerce was the assistance he gave to business in improving products, eliminating waste, and establishing standards. The superb research and testing facilities of the Bureau of Standards were employed for the benefit of business through cooperation with over

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[178]William C. Redfield, "The Letter Killeth," VII *The Nation's Business* 30-31 (June, 1919).

[179]Herbert Hoover, "Address," NAM, *Twenty-Sixth Convention* 239 (New York, 1922).

[180]Herbert Hoover, "Stopping the Waste In Industry," XXI *American Industries* 14 (March, 1921). It is interesting to note, in light of later events, that Hoover considered the recessive phase of the business cycle to be the greatest source of waste of productive capacity. Strikes, he felt, were the second major source of waste. He was looking tentatively toward the possibility of stabilizing the economy at a steady rate of growth. *Id.* at 13.

two hundred scientific, technical, and industrial associations. In order to obtain agreement on proposals for simplification and standardization, the Department held conferences with various industries where the proposals were discussed and, if possible, officially adopted by an eighty percent vote. Businessmen in general and trade associations in particular were very responsive to the program, and by 1928 simplification recommendations had been adopted in ninety commodity lines.[181] Without the efforts of Hoover and his Commerce Department, the promises of mass production and consumption, pioneered only a few years earlier by Henry Ford, could not have been realized.

In tune with his times, Hoover was also very interested in the activities of trade associations. He became the virtual patron of the trade association movement, even in the face of suspicion and hostility toward the associations from other branches of the government. In 1923 the Department of Commerce published the results of a study made "to ascertain and illuminate those activities of trade associations which contribute to public welfare."[182] The study was apparently meant to answer the critics of the trade associations and the policy of the Department toward them.

Hoover seems to have felt that combination for cooperation through trade associations was economically preferable and even somehow morally superior to combination through common capitalization. Trade associations differed from large aggregations of capital, Hoover said, in operating to lessen costs and to promote trade throughout a whole industry, not just for one concern. Trade associations did not, Hoover also asserted, exert any control over prices, production, or distribution. Finally, Hoover pointed out, a trade association could be instantly dissolved without disturbing capital or production if it was found to be violating the law. Dissolution of large companies for misconduct often produced such unpleasant side effects that the remedy was too drastic to be used.[183]

Partial explanation for Hoover's generous attitude toward trade associations can perhaps be found in the typically small and medium-sized business composition of trade associations. Hoover affirmed that "[a]ll those who know the situation in trade associations will realize that in

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[181]Benjamin S. Kirsch, *Trade Associations: The Legal Aspects* 224-27 (New York, 1928).

[182]United States Department of Commerce, *Trade Association Activities* xi (Washington, 1923).

[183]Hoover, "Address," *supra* note 179, at 241.

the main their membership comprises the smaller and the more moderate sized business of the nation."[184] Hoover, much like the early Wilson, was a firm believer in individualism and freedom of individual opportunity, and he obviously saw in the trade association a means whereby the smaller business interests of the nation could obtain the advantages of mass production without surrendering their independence or individuality.

There is some indication that Hoover was not alone in feeling concern for the fate of the individual in business. As previously discussed, several trade associations insisted that they were socially useful even though they admittedly tried to raise prices because they protected the little men of business. That such an appeal was used indicates that there were perhaps many Americans who would listen—many who were not altogether pleased by the prospect of a society dominated by mass production, mass living, and mass mentality. The general counsel of the NAM must have sensed some such sentiment when he declared in 1925, "It is by means of the trade or industry association, capably, honestly and efficiently conducted, that the business of moderate accomplishments is enabled to make its combined lawful efforts a citadel of protection against unlawful combinations and aggressions . . . ."[185]

Whatever the specific reasons, Hoover felt that trade associations were due special consideration. He thought that trade associations should be permitted to file a plan of their proposed operations with an agency of the government that would be empowered to pass on the legality of the proposed activities.[186] Hoover obviously intended to apply to trade associations the same sort of regulatory supervision that had been proposed for capital many years earlier by the men of the National Civic Federation. Ironically, Hoover did not believe that the privilege of consultation with the government should be extended to large aggregations of capital.[187] The program of the magnates had thus been taken from them and handed to men who in many cases had been those who had most adamantly opposed the very same program when it first appeared as an aid to big business.

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[184] *Id.* at 242.

[185] Nathan B. Williams, "A Charter for Associations," an address before the Conference of Industrial Association Executives, NAM, *Thirtieth Convention* 256 (New York, 1925).

[186] Hoover, "Address," *supra* note 179, at 21-22.

[187] *Id.* at 242.

Businessmen, of course, flocked to the feast that Hoover was preparing for them. For a long time, business had looked hopefully to the Department of Commerce as a source of assistance and protection. In 1916 the president of the Chamber of Commerce had said in a statement of purpose that "[t]he chief department of the United States Government in which we are interested is the Department of Commerce."[188] During the war the importance of the Department of Commerce was eclipsed by the activities of other government boards, but businessmen, especially those in the NAM, began to take increasing notice of the Department as soon as the return to Normalcy was well under way.

In 1923 the annual convention of the NAM passed a resolution acknowledging the efforts of Secretary Hoover on behalf of business and of trade associations, in particular.

> We express appreciation of the efforts of the Secretary of Commerce to develop that great department to more adequately carry forward those activities of vital interest to productive industry.
>
> We invite particular attention to the growing interest of the Department of Commerce in its study of the development of associated business activity, to which work our convention of a year ago gave much impetus. We confidently expect that from the Department's study will develop a more adequate appreciation of the value in the public interest in all forms of legitimate Association activity.[189]

Recognizing the opportunities presented by trade associations and the patronage given them by the Department of Commerce, the NAM began to campaign actively for the association movement. In 1924 the NAM drew up a Platform of American Industry, to be presented to the major presidential candidates, which stressed the need to relieve trade associations from antitrust prosecutions.

> The compilation and distribution of current trade information is essential to the intelligent conduct of modern business in the public not less than the private interest. It can be made available upon equal terms to the great body of business men of limited resources only through trade associations. The use of such organizations to further the suppression of production, the control of prices, the division of territory, is reprehensible and inexcusable, but it is essential that their legitimate function as an instrument of genuine public service be recognized and legally defined that abuses may be controlled and uses distinguished and approved. We cannot promote our economic life by

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[188]John H. Fahey, "The U.S. Chamber: Democracy of Business," address before the Fourth Annual Meeting of the Chamber of Commerce of the U.S., IV *The Nation's Business* 15 (February, 1916).

[189]"Resolution," NAM, *Twenty-Eighth Convention* 315-16 (New York, 1923).

> prohibiting trade associations from collecting and distributing useful information.[190]

The denunciation of the use of trade associations to restrict competition was all but an outright sham because the distribution of trade information was usually aimed at accomplishing that very end. The trade associations hoped to convince the public and the government that their new forms of collusion were something other than what they really were.

Some people might have been swayed by the propaganda, but the courts stubbornly refused to be convinced. In 1921 the Supreme Court decided the Hardwood Case, the first case involving the collection and dissemination of information by a trade association, and held that the defendants had violated the Sherman Act.[191] The Supreme Court concluded that the defendants had exchanged detailed information on sales, prices, and production for the purpose of maintaining prices and restricting production. The court rejected the defense that the restriction should not be considered a violation because the association encompassed only about thirty percent of national production. The extent of the restraint made no difference with respect to the law, the court declared.[192]

Two years later the Supreme Court confirmed the Hardwood ruling in its decision in the Linseed Case.[193] The court again held that the dissemination of trade information was a violation of the law even though the defendants had scrupulously avoided, as the defendants in the Hardwood Case had not, distributing any advice or interpretation based on the collected information. Each recipient of the information, which was distributed by an independent agency on a subscription basis, was left to himself to interpret and act upon the raw data. The Supreme Court concluded, however, that the information was so detailed and the effect of the distribution on production and prices was so obvious that the existence of a price pool, if only an implicit one, was unquestionable.[194] The court was not misled by the deceits of the trade associations.

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[190]"Platform of American Industry," NAM, *Twenty-Ninth Convention* 152 (New York, 1924).

[191]*American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

[192]National Industrial Conference Board, *Trade Associations: Their Economic Significance and Legal Status* 89-91 (New York, 129); George Roberts, "The Present Legal Status of Trade Associations and Their Problems," XI *Proceedings of the Academy of Political Science* 565 (1924-1926).

[193]*United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923).

[194]National Industrial Conference Board, *Trade Associations*, 91-92.

Despite the hostile attitude of the Supreme Court, Secretary Hoover continued to press the cause of the trade associations. Surprisingly, Hoover was in the minority in the supposedly pro-business Republican administration and could find few allies. The FTC was very wary of committing itself in favor of questionable business practices after the judicial reverses it experienced beginning in 1920, and the Department of Justice was skeptical of the claims made in favor of trade associations.

Early in 1922 Hoover undertook to obtain from the Attorney General, Harry M. Daugherty, a statement on the legality of various association activities, but Daugherty was rather noncommittal, especially about prescribing in advance the conditions under which specific activities would be considered legal. The Attorney General did not intend to tie his hands.

> It is impossible to determine in advance just what the effect of a plan when put into actual operation may be. This is especially true with reference to trade associations, whose members are vitally interested in advancing, or as they term it, stabilizing prices, and who through the medium of the associations are brought into personal contact with each other.[195]

It was not until some of the personnel involved in the enforcement of the antitrust laws had changed that the trade associations began to win their cases in the courts. In 1925 three of the six justices who had been in the majority in the Hardwood Case had been replaced by men more sympathetic to business.[196] The new court soon reversed the trend established in the Hardwood Case and the Linseed Case. In the Cement Case the Supreme Court decided that an arrangement to distribute reports of deliveries to be made in the future and the prices agreed to for such deliveries was within the law because there was no evidence of agreement or intent on the part of the contracting parties to use the information to fix prices.[197]

The decision of the Supreme Court in the Maple Flooring Case confirmed the reasoning applied in the Cement Case and contained, in addition, a statement that might well be considered the Magna Carta of the trade association movement. Justice Harlan F. Stone, speaking for the majority, declared,

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[195]Harry M. Daugherty to Herbert Hoover, February 8, 1922, as printed in Department of Commerce, *Trade Association Activities* 269.

[196]In the Hardwood Case, Justices Oliver Wendell Holmes and Louis D. Brandeis had vigorously dissented from the majority decision and had defended the right of trade associations to collect and disseminate information on past transactions. In 1925 these two great progressive jurists were still on the bench.

[197]*Cement Manufacturers' Protective Association v. United States*, 268 U.S. 588 (1925).

> It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. . . .
>
> It was not the purpose or the intent of the Sherman Anti-trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information.[198]

In the Department of Justice, no less than in the Supreme Court, personnel and policy changes occurred. Attorney General Daugherty was dismissed by President Coolidge in 1924 as a result of his involvement in several scandals, leaving the Justice Department free to adjust itself to a more lenient attitude toward business. Shortly after the Cement and Maple Flooring decisions were announced, the Justice Department acknowledged the change in the policy of the Supreme Court and announced that it had aligned its policy with that of the court.

> The position of the department as outlined in these petitions brought it more nearly in line with the views of other agencies of the Government having to do with the subject of trade associations, thus bringing about a uniformity of policy and practice which will be of assistance to business men who desire by cooperative methods to eliminate waste and unfair trade practices in industry and at the same time to keep strictly within the law.[199]

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[198] *Maple Flooring Manufacturers' Association v. United States*, 268 U.S. 563, 582-84 (1925).

[199] *Annual Report of the Attorney General of the United States for Fiscal year 1925*, at 20, as quoted in

The Cement Case and the Maple Flooring Case were real boons for the trade associations. The associations had been forced to alter their activities after the legal reverses of 1920, but after the decisions of 1925, they were able to operate without fear of harassment. Hoover had not championed the cause of the associations in vain.

Kirsch, *Trade Associations* 15.

THE LATER FTC: GREATER SUCCESS

Changes of personnel and policy in the Federal Trade Commission paralleled and complemented similar changes in the Supreme Court and the Department of Justice. In 1925 William E. Humphrey was appointed to the FTC, putting the members who were sympathetic to business in the majority. It was not long after entering office that Humphrey announced "radical" and "revolutionary" changes in the procedure of the Commission.[200] The Commission was to base its policies on a new philosophy. "The changes in the rules and policy that have been recently made is based upon this proposition: The majority of the Federal Trade Commission, as it is composed today, believes that the men and women of this country, engaged in business, are generally honest."[201]

Humphrey said, in effect, that the new policy was to be unashamedly pro-business. He expressed open contempt for those who would criticize his program and cast doubt on the integrity of the American businessman. Opposition to his policy of assisting business would come, he declared, not from the public or either of the established political parties but from "that beatific and vocal fringe, the pink edges that border both of the old parties. . . . We are going to have the opposition of every radical, socialist, communist and professional reformer, both in and out of Congress."[202]

The first of the momentous changes that were expected to provoke such an outcry was the greatly increased use of stipulation agreements in place of litigation in enforcing the antitrust law. Under this procedure the Commission would exercise the prerogative given it in the enabling act to waive prosecution of violations of the law if it felt that prosecution was not clearly in the public interest. Cases would be settled whenever possible by stipulations, which were signed statements from the defendants confirming the accuracy of the charges of the Commission and agreeing to cease and desist from the practice complained of. Violation of a stipulation agreement could be punished by prosecution under the Sherman Act, using the defendant's signed confirmation of the original charges as evidence to support the charge.

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[200]William E. Humphrey, "Helping, Not Hindering, Business," NAM, *Thirteenth Convention* 161 (New York, 1925).

[201]*Id.*

[202]*Id.* at 169-70.

Humphrey claimed several important advantages from an administrative standpoint for the stipulation. Stipulations were effective immediately, unlike court orders, which might take years to obtain. Furthermore, stipulations were even more effective than court orders as a means of enforcement because a stipulation agreement, which was tantamount to a signed confession, could often be secured in cases where there was insufficient evidence to obtain a conviction if the case were taken to court. A final consideration was the economy of the stipulation. Obtaining a stipulation cost only a fraction of the amount that prosecuting a case in court consumed. The total saved in the operation of the FTC alone was significant.[203] There were few if any disadvantages to mar the appeal of stipulation procedure. Humphrey claimed that his records indicated that during the first four years of the use of the stipulation, ninety-nine percent of all stipulation agreements were obeyed.[204] The advantages of the stipulation to the government were obvious.

Other considerations, perhaps more important, lay behind the use of the stipulation. It seemed unjust to Humphrey and men of like mind to insist on prosecuting every violation of the law that the Commission discovered because, given the rather subjective nature of the antitrust laws, it was not at all unlikely that many businessmen would unknowingly violate the law. To subject these businessmen to the adverse publicity of prosecution, especially when the Commission was often found in error, was unreasonably harsh when the same purpose could be served by less drastic means. Stipulations were an excellent alternative.[205]

In addition to guarding against unjust oppression of business, the new procedure corrected several minor injustices of which business had complained in the past. There had been instances when a case against a company had been publicized, to the detriment of the reputation of the company, and then dismissed before the company was given a chance to vindicate itself in the eyes of the public.[206] Under the new procedure, publicity with respect to a complaint was to

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[203]Humphrey estimated a savings of $350,000 in settling 134 cases by stipulation between March 11 and October 25, 1925. *Id.* at 164-65.

[204]William E. Humphrey, "Business Ethics and the Federal Trade Commission," *The Ethical Problems in Relations of Business to Government*, William A. Vawter Foundation lectures, 1931, Northwestern University School of Commerce 45 (New York, 1932).

[205]Humphrey, "Helping, Not Hindering, Business," *supra* note 200, at 164.

[206]"Board of Directors' Annual Report: Controversy With the Federal Trade Commission," Chamber of

be closely restricted until the accused company had a chance to defend itself. Also, the confidence of information delivered to the Commission in good faith was given more respect than in the past. Nothing whatsoever was to be published unless the Commission officially decided that publication was in the public interest.[207]

The new procedure promised to make the FTC more truly a regulatory agency than it had ever been before. The use of the stipulation empowered the Commission to define unfair methods of competition in spite of the *Gratz* decision. Many companies would prefer signing a stipulation that agreed to the interpretation and terms of the Commission as an alternative to fighting the case in court even if the case would probably be decided against the FTC. The threat of prosecution, even unsuccessful prosecution, could be a rather effective regulatory device.[208] On the other hand, practices that were technically illegal might, at the discretion of the FTC, go unprosecuted if only the Justice Department would acquiesce to the judgment of the Commission. The new policy of the Justice Department seemed to guarantee the requisite cooperation. In short, the Commission would begin to exercise those powers and prerogatives that the Progressives had felt that it should.

The change in the nature of the functions of the Commission seems to have been quite deliberate, for Humphrey openly declared that "[w]hatever may have been the practice in the past, hereafter the Federal Commission is not going to be a sort of 'smelling committee' or detective bureau for any other branch of the Government."[209] The FTC did not intend to play the role of the investigative body the *Gratz* decision had apparently assigned to it. It planned to play a greater part in determining the fortunes of business at the hands of the law, maintaining cooperative rather than antagonistic relations with business, as the Progressives had proposed. The Commission aspired to bridge the gap between business and the government and, in emulation of Hoover, to coordinate the efforts of business and the government for the benefit of the public. As Humphrey characterized the change, "The old policy was one of litigation; the

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Commerce of the U.S., *Seventh Annual Meeting* (1918).

[207]Humphrey, "Helping, Not Hindering, Business," *supra* note 200, at 162, 166.

[208]Recall the reluctance of the National Civic Federation to depend on the rule of reason. Businessmen heartily disliked lawsuits, even successful ones.

[209]Humphrey, "Helping, Not Hindering, Business," *supra* note 200, at 166.

new policy is one of cooperation."[210] Whether consciously or not, the FTC made itself over in the image of what, historically speaking, it had been expected to be.

The changes that the FTC made, although seemingly radical and without precedent, had substantial basis in law. The changes were more in attitude than in practice, for none of the procedures described above were really new to the Commission. The Commission was authorized by law to use stipulation agreements at its discretion and had done so in the past. It also had the legal prerogative of choosing not to prosecute a case when it did not feel that prosecution was in the public interest. The Commission had been given this prerogative mainly to prevent it from being distracted from its work by the necessity of having to prosecute every minor complaint that it received, but there was nothing to prevent the Commission from exercising the same prerogative for different reasons if it chose to do so.

The changes that Humphrey announced were thus changes of policy only. The FTC and the administration as a whole had chosen to take a more tolerant and cooperative attitude toward business, replacing some of the former concern that business be allowed to do nothing that was wrong with a concern that it be assisted to do more that was right.

In order to render positive assistance to business, the FTC revived yet another old and languishing procedure, the trade practice submittal, renamed the trade practice conference to denote the change. After the fashion of the earlier submittals, the conferences were meetings of representatives of an industry, called at their initiative, to discuss "any question they wish or adopt any rules or regulations they desire."[211] A member of the FTC was present only to advise and to state the position of the Commission on any question raised. The results of a conference were drawn up as resolutions and submitted to the member of the Commission for his approval or rejection. The resolutions were usually divided into two groups by the Commissioner, those which the FTC had power to enforce as law and those which, not being enforceable as law, were accepted merely as expressions of industry opinion.[212]

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[210]Humphrey, "Business Ethics," *supra* note 204, at 43.

[211]*Id.* at 46.

[212]For an example of this procedure, see the proceedings for the conference held among manufacturers of anti-hog cholera serum and virus, which was the first conference held after the institution of the new policy. Federal Trade Commission, *Trade Practice Submittals* 58-63 (Washington, 1925).

Once a representative conference had accepted a set of rules, the FTC assumed the responsibility of distributing copies of the rules to every member of the industry. Even though a company did not choose to subscribe to the rules, it would still be held responsible by the FTC for obeying the rules accepted by the conference.[213] Any violation could be made the subject of a suit filed by the FTC.

The Commission did not file suit because an industry had condemned a practice but because it felt that the practice condemned was already illegal. There was no intention of allowing an industry to interpret or to re-write the law. Humphrey insisted that the conferences "do not in the slightest degree change the law."[214] The Commission was careful to approve the condemnation of only those practices which, after examining the facts in the context of the particular industry, it felt confident it could successfully prosecute under the existing antitrust laws.

Matters that were concerns of ethics rather than law were placed in the second group of rules and accepted only as expressions of industry opinion.[215] The precedent of the *Gratz* decision, which gave the FTC power to enforce the law only as interpreted by the courts, still stood, and the Commission was careful to observe it. The legal position of an industry and its practices was unchanged by participation in a conference. The practices that were condemned at a conference could have been prosecuted by the FTC if discovered, regardless of the conference.

The purpose of holding a conference that did no more than condemn activities that were already illegal was twofold. First, the FTC benefited by hearing what was in essence a confession from the soul of an industry. The Commission had an opportunity to examine closely the business practices of a particular group of companies without the expense and trouble of an investigation conducted without the cooperation of the industry. Practices that the Commission found to be illegal could be condemned by the conference and thereby effectively abolished without the usual effort of discovering and prosecuting each instance of the violation. The trouble, expense, and ill-will of numerous individual prosecutions were saved by a single

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[213] *Id.* at 3-4.

[214] Humphrey, "Business Ethics," *supra* note 204, at 46.

[215] FTC, *Trade Practice Submittals* 4.

resolution of a conference.[216] Secondly, the participating industry benefited by being able to present its practices for official examination without the risk of being prosecuted if something was found amiss. The FTC lodged no formal complaints as a result of information disclosed at a conference. The conference could thus save an industry many unpleasant prosecutions. Furthermore, the industry had a chance to defend its own views before the Commission passed judgment. The conference was the answer to the old and continual demand of businessmen that they be given authoritative advice on the antitrust laws as they applied to the circumstances of a particular industry.

The trade practice conference was, in effect, a sort of group therapy session intended to keep the activities of an industry on the proper side of the antitrust law. Yet it was more. It was also an experiment in business self-regulation. As Humphrey characterized it, "The Trade Practice Conference may be defined as a method of cooperation of the Commission with an industry as a whole to clean its own house."[217] The element of self-regulation, which extended beyond the scope of the law, was introduced in compiling the second group of rules. These rules could not be enforced by law but might be adhered to voluntarily by the members of the industry in question. Because the Commission would not accept resolutions, even in the second group, that it felt were inappropriate, the approval of the second group of rules, even as only the expression of industry opinion, implied that general agreement among members of the industry to adhere to the rules did not constitute a violation of the antitrust laws.

The second group of rules not only constituted a means by which an industry might set ethical standards for itself, it also provided a means of obtaining official approval, if not protection, for certain collective agreements. The first group of resolutions told an industry what it could not do, and the second group told it what it could do if it pleased.

The full implications of the use of the second group of trade rules do not appear to have occurred to the FTC. The Commission was primarily concerned with the rules in the first group, which were within its jurisdiction. Business, however, was quick to see the possibilities of the second group of rules and to take advantage of them. The second group of rules was soon put to

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[216] *Id.* at 3; Federal Trade Commission, *Trade Practice Conferences* 1 (Washington, 1927).

[217] Humphrey, "Business Ethics," *supra* note 204.

work as a vehicle for many of the practices that had been adopted with only moderate success by the trade associations.

Many resolutions were subtly—some even blatantly—designed to maintain uniform prices, to restrict channels of distribution, or to raise profits by transferring some of the costs of selling to the buyer. For example, the millwork industry passed a resolution condemning "dumping," the sale of surplus stock at a reduced price outside the dealer's normal area of distribution.[218] The resolution condemning dumping was widely imitated, and many variations of schemes to maintain uniform terms of sale also appeared. The grocery industry, which had been heard from before, held a conference in which it was resolved "[t]hat the use of any uneconomic or misleading selling price is an unfair method of business."[219] Sales at a low or negative profit margin were not supposed to take place. Not long thereafter, a resolution in favor of uniform cost accounting appeared.[220] The cut-stone industry eagerly seized this precedent and carried it even further. The resolutions of the stone-cutters provided for uniform cost accounting, mutual exchange of bids, publication of price lists, and circulation of reports of all sales and the terms of all contracts.[221] No trade association had been more ambitious or more successful at collusion.

As might be expected, businessmen rushed to hold trade practice conferences. Only five conferences were held during the first year of the use of the new procedure, but word soon spread, and the number increased rapidly. By 1929, the year in which the stone-cutters displayed their audacity, the number of conferences had soared to fifty-seven for the year. A virtual landslide was taking place. Trade associations were urging their members to utilize the conference plan, and the members were responding.[222]

Something happened in the next year, however, to reverse the trend. The number of conferences fell to ten for the entire year. The onset of the Depression might have had something to do with the sudden decline of the Commission's business, but the effect was probably minor. Hard times, it would seem, would only whet the appetite of businessmen for

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[218]Federal Trade Commission, *Trade Practice Conference* 142, 144 (Washington, 1929).

[219]*Id.* at 20.

[220]*Id.* at 186.

[221]*Id.* at 197.

[222]Nelson B. Gaskill, *The Regulation of Competition* 120 (New York, 1936).

restrictive practices. Indeed, some of the most ambitious cooperative schemes ever to appear came from the depths of the Depression.

One author who has inquired into the subject attributes the sudden loss of interest on the part of business in the conference practice to a sudden increase of interest on the part of the Justice Department. No formal complaint was made to the FTC about its conferences; only a "friendly visit" was paid to the Commission office by a member of the Justice Department. The visit was enough.[223] The Commission had already begun to have reservations of its own.

In 1925 the FTC had begun, at the direction of the Senate, an investigation of the so-called open-price trade associations which, although generally favorable to associations, led the Commission to question some of their activities. The report of the Commission to the Senate pointed out that trade associations had a natural tendency toward restricting competition and that what was often called cooperation should more properly be termed conspiracy.[224] The cooperative efforts of the associations to "stabilize" prices usually led to the highest price in an industry becoming the prevailing one. Turning one of their own arguments against the associations, the report declared, "The preservation of the inefficient by trade agreements is a form of industrial waste, and the policy of the United States is to accept the wastes of competition rather than the wastes of monopolistic control."[225]

The inquiry of the Justice Department set the FTC to work cleaning its house. The Commission began reviewing and revising all outstanding conference codes without notice or explanation. Business became angry and upset, but its protests were in vain. The attack had begun from all quarters. In 1929 the Department of Justice initiated proceedings against eight trade associations, five of which were eventually dissolved by court order. The days of feasting were over.

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[223] *Id.*

[224] *Open-Price Trade Associations: Letters from the Chairman of the Federal Trade Commission, transmitting in response to Senate Resolution No. 28 (69th Cong., Special Sess.) [1925]*, S. Doc. No. 226, 70th Cong., 2nd Sess. 347-48 (1929).

[225] *Id.* at 343-44.

THE END: FRANKLIN D. ROOSEVELT

The Depression, ironically enough, gave the business community a brief respite from the return to stricter antitrust enforcement. Upon taking office, President Roosevelt was utterly lacking in plans for industrial recovery, save for the temporary expedient of devaluation, and he was thus somewhat at the mercy of any interest group that could present a convincing program. The American Federation of Labor was the first to place a proposal directly before Congress. The bill of the AFL would have limited the hours of labor in industry to thirty per week. Roosevelt and his advisers felt that the bill was a threat to recovery but had to give the measure half-hearted endorsement for lack of a substantially better alternative to propose. Businessmen, however, set up a howl, and Roosevelt commissioned one of his advisers to find out what they wanted.

Business was ready and eager to be consulted. The U.S. Chamber of Commerce had been working on the recovery problem since early 1931. Many of the proposals of the Chamber were incorporated into the National Industrial Recovery Act, the answer to the AFL bill that the administration sent to Congress in May of 1931. The NIRA was, in Arthur Link's words, "one of the most pretentious pieces of legislation ever presented to Congress at that time."[226] It proposed to eliminate ruinous competition, to limit production to actual demand in order to raise prices, and to guarantee reasonable hours and decent wages for labor. The ends of the bill were to be accomplished through the establishment of codes of practice for all forms of business by committees composed of representatives from business, labor, and the public. A solid coalition of business, labor, and the administration served to push the bill through Congress in short order.

The act was intended to benefit all elements of society—business, labor, and the general public—equally, but in practice the administration of its terms was dominated by businessmen for their own benefit. Not surprisingly, the trade associations played the greatest role in the formation of the codes of practice. The associations were soon indulging in all their old, familiar forms of conspiracy in restraint of trade. They established production controls, open-price agreements, minimum prices, regulations against sales below cost, and prohibitions of many allegedly unfair methods of competition.

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[226]Link, *American Epoch* 399.

The trade associations were controlled by their larger members, so the codes tended to discriminate against the smaller members, with the result that tension developed between large businesses and small businesses. As in 1912, however, the small businesses were not so concerned that the collusive practices of large businesses should be eliminated as they were that their own sly practices should not be curtailed. Internal dissension within the business community and clashes between businessmen and the administrators in the government had made the prospects for the continuance of the NIRA doubtful when the Supreme Court, returning to its pre-1925 philosophy, settled the matter by declaring the whole endeavor unconstitutional.[227]

Viewed in its historical context, the NIRA was anything but a New Deal. It was instead a re-run of a very old and familiar spectacle, that of the continual efforts of business to regulate itself for its own benefit. It is hardly necessary to point out the similarities between business behavior in the 1920's and under the NIRA; the similarities are obvious. Yet there are some broader implications of the NIRA that perhaps need examination. Arthur Link characterized the New Deal, or at least the latter half that he called the Second New Deal, as the culmination of American progressivism. This approach has significant merit, but it raises the question of how to classify the interim period and the more basic question of how to define progressivism. Because the NIRA had roots not simply in the 1920's but also in the Progressive platform of 1912, it would be inaccurate to exclude the NIRA from the definition of progressivism entirely. Yet how can the NIRA be reconciled with Link's definition, which appears to be an accurate and useful one, of progressivism?[228]

The answer can perhaps be found in Arthur Link's treatment of the New Deal as two different, though overlapping, policies. If there was a duality to the New Deal, it might have been because there was a duality to progressivism. The first element of progressivism encompassed the efforts of the American people to regain control of their government from the grip of the machine politicians and control of their economy from the monopolists and other vested interest groups. These attempts at reform constitute progressivism as generally understood.

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[227] *Id.* at 398-401.

[228] Introduction, *supra*, text accompanying note 4.

Progressivism also contained another very important element that might be less generally understood. This element, which was somewhat contradictory to the first, encompassed the efforts of certain financial interests to bend the course of reform to their own purposes. These interests proposed that private power and privilege not be abolished but regulated and even encouraged by the government for the benefit of the public. The spokesmen of these interests succeeded in injecting their philosophies into the progressive movement and especially into the Progressive Party and its platform of 1912. It is to these interests that Gabriel Kolko ascribed the political victories of the era.[229]

The second form of progressivism, in evolved and modified form, dominated politics during the 1920's and under the NIRA. The first form of progressivism survived during this time only in certain incidental political movements such as the agrarian agitation for aid to agriculture and the pressure for federal funds for regional development.[230] After the deceptions that were inherent in the second form of progressivism had become apparent, the country started to swing back toward the first form, as indicated by the revival of antitrust proceedings on the eve of the Depression. This swing was temporarily reversed during the confusion following the market crash of 1929 as the country searched blindly and desperately for a way out of its misery, but in the end, during the Second New Deal, the first form of progressivism became dominant.

If the first form of progressivism triumphed in the end, why did it ever go into even partial eclipse? Part of the answer lies in the contradictory natures of the two main elements of progressivism. Contrary to what Kolko claimed, the pre-war era did not terminate in a triumph for the conservatives. The situation was more of a stalemate. The FTC was supposed to be a regulatory agency similar to the Interstate Commerce Commission, but in reality it was not. Uncertainty over its true nature and function incapacitated the FTC for several years. When the Commission finally began to take tentative steps toward exercising those powers and prerogatives its major proponents had expected it to have, the Supreme Court promptly ruled that the Commission had no right to the powers it claimed. The first form of progressivism, which proclaimed that there should be no special interest groups within American society, had

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[229]Kolko, *Triumph of Conservatism*.

[230]Link, "What Happened to the Progressive Movement in the 1920's?," *supra* note 4, at 833-51; Link, *American Epoch* 318-38.

apparently triumphed over the second form, which hoped to maintain privilege on a regulated basis.

The conflict was not so easily resolved, however. No sooner had the Supreme Court quashed the aspirations of the FTC than the Department of Commerce, under Herbert Hoover, began to promote the idea that government should indeed cooperate with and assist business and allow it to form combinations to further its interests. Until 1925 a tug-of-war of policy took place between Hoover and the courts. In that year appointments made by President Coolidge changed the personnel in key positions in the government, and Hoover's ideas became predominant within the administration. Business, especially the trade associations, held a jubilee of self-indulgence for the next four years until, suddenly, the pendulum began to swing in the other direction. Almost immediately afterward, the Depression struck as if to punish business for its sins. So severe was the punishment that it frightened the rest of the country into giving business one more chance, but this brief respite was soon repealed. Finally, after much turmoil, Kolko's conservatives were vanquished, not triumphant, and were never to rise to their former influence again. The conflict between the progressives who wanted social reform and the Progressives who sponsored Theodore Roosevelt's antitrust policy was not resolved in a day or even a decade. It took nearly three decades, each one filled with turmoil.

The eventual defeat of their program did not disturb the magnates, Kolko's conservatives, for they had left the scene long before the final battle was fought. The magnates had barely survived long enough to see what appeared to be the victory of their ideology, the establishment of the Federal Trade Commission. By the time the war was over, the community of magnates had been almost entirely displaced as the leaders of American business by a vigorous and growing body of small and medium-sized businesses. Perhaps the continual assault of the antitrust laws had worn away the strength of the magnates to the point where they were no match for the restless, energetic men immediately beneath them on the commercial ladder. Perhaps the magnates were simply obsolete. When the antitrust laws began to be enforced seriously, the magnates had little reason for being. Their giant combinations had never been particularly efficient, and perhaps they succumbed to the competition of smaller but more vigorous firms once their collusive methods of self-protection were denied to them. Whatever the reason, the magnates disappeared from the American business community as a dominant power.

If the magnates were gone, what kept their ideas and program alive for nearly another two decades? The ranks of medium-sized businesses that succeeded the magnates had been, in general, somewhat hostile to the magnates and their program. They had shown a marked aversion to change of reformist, Progressive, or any other stripe. After these businessmen of moderate means had reached their new position of influence, however, they discovered just why the magnates had proposed the program that they had. Cooperation brought higher profits. It was as simple as that. Some businessmen of only modest means, usually those who were hardest-pressed by competition, had discovered the secret of the magnates much earlier than their fellows and had joined the magnates in preaching the gospel of cooperation. During the war the rest of the business community became initiated to the benefits of cooperation, and as a result, trade associations and collusive agreements began springing up like weeds. Having displaced the magnates as the politically most important element in business, the businessmen of moderate means then proceeded to embrace their ideology.

But why were these medium-sized conspirators not immediately subjected to the same criticism that had plagued the magnates? These neophyte conspirators had not provided the vitality for the antitrust movement and so could not control the movement at will. Middle-sized industrialists, as typified by the group behavior of the NAM, had been adamantly anti-reform and were certainly not the ones who had cried most loudly against the trusts. Where were the trust-busters when the trade associations began to multiply?

To answer this question, it is first necessary to determine who the trust-busters were. It is generally recognized that much of the energy of the progressive movement originated among the middle class.[231] Progressive trust-busters tended to be white-collar workers, merchants, and other small businessmen. These groups were the ones most vehement in their denunciation of big business, as indicated by their testimony before the Congressional hearings on antitrust legislation. They felt that their positions in society were threatened by big business. Businessmen a bit further up the scale in size—those in the NAM, for instance—felt more secure in their positions and although antagonistic toward big business, tended to take a live-and-let-live attitude toward the very largest combinations. They did not support strong antitrust enforcement for fear that it would be turned against them.

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[231] Link, "What Happened to the Progressive Movement," *supra* note 4, at 836.

When moderate-sized businesses ascended to a position of leadership in the economy, they had little reason to support strong antitrust policies. As they became engrossed in the trade association movement, they had even less reason to do so. When middle-sized businesses grew, they had to recruit new personnel to fill the growing number of managerial positions being created. Most of the recruits, it seems logical to assume, came from the ranks of businesses immediately below on the size scale. These new recruits were just the men who had typically been the trust-busters. As new opportunities opened for them in business, they began to forget their feelings of insecurity and consequently also began to forget their hatred of the trusts and other combinations. The middle class, in short, defected from the progressive movement.[232]

As the middle class entered into medium-sized industry, it accepted and joined in the activities it found there. When the war created the boom in trade association activity, the former trust-busters entered into the collusion as eagerly as the rest. Trade associations, after all, had not been unknown among the middle class in earlier years and had apparently even been fairly respectable. In answer to Link's question, "What happened to the progressive movement in the 1920's?," it might well be said that it joined the trade associations.

[232] *Id.* at 843.

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2. Agency Publications.

a. Henry Miller, Federal Trade Commission, *World War Activities of the Federal Trade Commission, 1917-1918* (1940). The importance of this document lay in its containing no information of consequence to the subject of this paper. It testifies to the failure of the FTC to function as a regulatory agency during its early years.

b. U.S. Department of Commerce, *Trade Association Activities* (1923). This book by its very existence was important evidence of Hoover's policy toward trade associations. The information it contained was not used.

c. Federal Trade Commission, *Trade Practice Submittals* (1925); *Trade Practice Conferences* (1927); *Trade Practice Conferences* (1929). These cumulative reports of the FTC conference program were essential to the chapter entitled "Success of the FTC."

B. Business Publications.

1. Organizational Records.

a. Chamber of Commerce of the United States, *Annual Reports* (1916-1921). The Chamber of Commerce reports contained little of value to this paper.

b. National Association of Manufacturers, *Proceedings of the Annual Conventions* (1903-1925). The NAM records provided excellent indications of what the NAM members were thinking at any given time. They were invaluable and were cited often.

c. National Civic Federation, *Annual Meeting* (1910-1912). The Civic Federation records contained one article of importance to this paper.

2. Organizational Periodicals.

a. Chamber of Commerce of the United States, *The Nation's Business*, vols. II-VIII (1913-1920). This periodical was very useful, yielding several valuable articles by or about government officials. It also provided helpful information on business opinion.

b. National Association of Manufacturers, *American Industries*, vols. XVI-XXVI (1916-1926). This periodical was helpful, providing information similar to that derived from *Nation's Business* but not so valuable.

c. National Civic Federation, *National Civic Federation Review*, vols. III-V (1908-1912, 1914-1920). This periodical was very valuable, primarily because members used it as a forum for their opinions.

C. Personal Accounts of Men in Public Service.

1. Bernard M. Baruch, *American Industry in the War* (1941). Baruch's account of the governmental control, which he directed, of the national economy during the war was both valuable and very interesting. It helped explain the important changes that occurred in business attitudes during the war.

2. William E. Humphrey, "Business Ethics and the Federal Trade Commission," *Ethical Problems in Relations of Business to Government* 42-60 (1932). This article, which was written by a member of the FTC, was a very important indicator of FTC policy and motivations after 1925.

3. George Rublee, "The Original Plan and Early History of the Federal Trade Commission," XI *Proceedings of the Academy of Political Science* 666-672 (1924-1926). Without this account, historians might still be puzzled by the outcome of the trade commission bill. The article was important to this paper for its demonstration of the great influence of Progressive ideas on the formulation of the FTC Act.

D. Political Documents.

1. Kirk H. Porter, *National Party Platforms* (1924). This compilation included a copy of the Progressive Party platform of 1912, which was very important in establishing the

influence that the ideas expressed by representatives of big business had on the Progressive trust policy.

2. Woodrow Wilson, *The New Freedom* (1913). The sections of this book that dealt with trust reform were very useful indicators of Wilson's policy concerning business.

E. Articles and Addresses.

1. George W. Perkins, "The Modern Corporation," an address delivered at Columbia University (Feb. 7, 1908).

2. George W. Perkins, "Business and Government," *Saturday Evening Post* 22-23 (Mar. 16, 1912).

3. George W. Perkins, "National Action and Industrial Growth," an address delivered at the Lincoln Day Dinner of the Progressive Party (Feb. 12, 1914).

All three of these public pronouncements by George Perkins, the most articulate spokesman of big business, were important as indicators of what big business was thinking and of how it hoped to persuade the public to think.

F. Other.

1. *Moody's Manual of Railroads and Corporation Securities*, vols. X, XV, and XX (1900-1925). This reference provided information that was extremely useful in determining the sizes of interests represented in the NAM.

2. *Standard Corporation Service* (1915). This reference supplemented the information provided by Moody's in one instance.

3. "U.S. Inspectors Check Operations of a Busy Airline," IV *The National Observer* 1, 14 (Mar. 1, 1965). This article contains an example of a problem posed during the progressive era that is still important today.

II. SECONDARY SOURCES.

A. Monographs, Historical.

1. Gabriel Kolko, *The Triumph of Conservatism* (1963). This work is an important contribution to the historiography of the progressive era. Kolko demonstrates the important role that big business played in the events of the era, an aspect of the period that was all but neglected until the late 1950's. Kolko, however, overstates his case. The counter-maneuvers staged by the conservatives of big business accomplished little more than a delay of their own demise, not a triumph over reform. The victory that conservatives did win was won in the 1920's and by a different group of conservatives.

2. Robert H. Wiebe, *Businessmen and Reform: A Study of the Progressive Movement* (1962). This study is better balanced than Kolko's. It takes into account all business interests although it concentrates on big business. Wiebe's work is also obviously the result of a massive research effort and contains a wealth of information. The analysis tends to suffocate among the facts, however, forcing the reader to formulate his own synthesis and draw his own conclusions.

B. Monographs, Economic and Legal.

1. Nelson B. Gaskill, *The Regulation of Competition* (1936). This analysis of the FTC asserts in a rather sarcastic manner that the philosophy embodied in the FTC Act was Progressive and not Wilsonian. Gaskill accuses Wilson of accepting the change proposed by George Rublee, a member of the Progressive Party, without realizing the importance of the difference. Gaskill is clearly wrong because Wilson's correspondence indicates he made a deliberate, conscious choice in favor of Rublee's plan. Gaskill is correct, however, in pointing out that the FTC was not given the legal powers to be what it was supposed to be—a regulatory commission. The *Gratz* decision, Gaskill correctly concludes, was the only logical interpretation that could be given to the FTC Act.

2. Gerard C. Henderson, *The Federal Trade Commission* (1925). This study of the FTC is one of the better ones on the subject. It was consulted in the formulation of the topic and used for background material.

3. Benjamin S. Kirsch, *Trade Associations: The Legal Aspects* (1928). This study is informative and relatively easy for the layman to comprehend. It was very useful in providing background knowledge and a few items of specific information.

4. National Industrial Conference Board, *Trade Associations: Their Economic Significance and Legal Status* (1925). This study provided helpful legal summaries. It was not read extensively.

5. Simon N. Whitney, *Trade Associations and Industrial Control* (1934). This book was consulted for background information on trade associations. It was not read extensively.

C. Articles.

1. Hugh P. Baker, "Practical Problems of Trade Associations," XI *Proceedings of the Academy of Political Science* 629-643 (1924-1926). This study provided supporting information only.

2. Arthur S. Link, "What Happened to the Progressive Movement in the 1920's?," LXIV *American Historical Review* 833-51 (July, 1959). This study was the only one found that dealt explicitly with the evolution and persistence of progressivism in American politics of the postwar period. This paper parallels Link's article, both depending upon it and supporting it. Link's article deals primarily with the social reform elements of progressivism and gives the trust issue only passing mention. It does identify, however, the defection of the middle class from progressivism as a result of becoming involved in business as a cause of the decline of progressivism after the war. This idea was incorporated in and given further support by this paper. Link contends that progressivism declined but did not die after the war and lived on to have significant influence during the late 1920's and later. This paper poses essentially the same question but examines it in a different manner. The conclusions reached are basically in agreement with Link's.

3. George Roberts, "The Present Legal Status of Trade Associations and Their Problems," XI *Proceedings of the Academy of Political Science* 557-70 (1924-1926). This study provided supporting information only.

4. Robert H. Wiebe, "Business Disunity and the Progressive Movement," XLIV *Mississippi Valley Historical Review* 664-85 (March, 1958). The basic idea presented in this article is that business was divided along several lines over the trust issue. The importance of the article is considerably overshadowed by Wiebe's later work.

5. Robert H. Wiebe, "The House of Morgan and the Executive, 1905-1913," LXV *American Historical Review* 49-60 (October, 1959). This article describes the efforts of the Morgan Company and its allies to establish a rapport with the government. It perhaps provided the idea upon which Kolko based his work. Much of the information provided in the article is incorporated in the first chapter of this paper.

D. Surveys and Special Studies.

1. Magnus W. Alexander, *The Changing Environment of American Industry and the National Industrial Conference Board* (1926). This study provided very important statistical evidence of the shift of capital in the American economy to middle-sized industry.

2. Waldo E. Fisher and Charles M. James, *Minimum Price Fixing in the Bituminous Coal Industry* (1955). This study was consulted for incidental supporting information.

3. National Civic Federation, *The Trust Problem: Replies of 16,000 Representative Americans to a Questionnaire* (1912). This study was used only to confirm evidence already obtained from Congressional hearings.

4. Willard L. Thorp, "The Changing Structure of Industry," *Recent Economic Changes in the United States* (1929). This study supports the evidence of the study by Alexander. Both were very important.

E. General History.

Arthur S. Link and William B. Catton, *American Epoch: A History of the United States Since the 1890's* (2d ed. 1963). This textbook treats progressivism as a continuous force in American politics from the 1890's through the New Deal. This approach seems sound. The text is somewhat brief in its treatment of the trust problem, but it was useful as a general reference and was especially valuable as a source of information about the NIRA.

F. Biography.

Arthur S. Link, *Wilson: The New Freedom* (1956). Only the chapter on the formulation of the FTC and the Clayton Acts was used, but it was very helpful. Link asserted that Wilson deliberately altered his ideas and plans so that they came to resemble the Progressive philosophy. His assertion appears to be correct.

G. Unpublished Dissertation.

Gordon M. Jensen, *The National Civic Federation: American Business in an Age of Social Change and Social Reform* (1956) (unpublished Ph.D. dissertation, Princeton University). This study was an extremely valuable resource. Jensen convincingly demonstrates that the National Civic Federation represented the largest business interests of the nation and that they generally supported the reform movements of the progressive era. He does not, however, completely examine their motives.

H. Other.

Arthur Jerome Eddy, *The New Competition* (1913). The importance of this book lies in its historical context. It is an indicator of how many businessmen thought during the high-tide of progressivism.